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IN THE

Supreme Court of the United States

_____ TERM, 1980

No. 79-1168

FREDERICK N. McDONALD, Petitioner,

v.

JOHN R. HOGNESS, President of the University of Washington; DR. BENJAMIN H. BELKNAP, Chairman of the Admissions Committee of the University of Washington School of Medicine; DR. ROBERT L. VAN CITTERS, Dean of the Medical School; DR. ROBERT A. FLENNAUGH, GEORGE V. POWELL, JAMES R. ELLIS, R. MORT FRAYN, MRS. WILLIAM H. GATES, JACK G. NEUPERT, R. S. PHILIP, and the Board of Regents, University of Washington; W. W. WASHBURN, Registrar of the University of Washington; UNIVERSITY OF WASHINGTON, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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January 26, 1980

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FREDERICK N. McDONALD, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI
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_____

The petitioner Frederick N. McDonald respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on August 2, 1979.

OPINION BELOW

The opinion of the Washington Supreme Court, reported at 92 Wn.2d 431, 598 P.2d 707, appears in the appendix hereto.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on August 2, 1979. A timely

motion for reconsideration was denied on October 31, 1979, and the State Supreme Court's mandate was issued on November 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

The following questions are presented by this petition:

A. Whether the Fourteenth Amendment of the United States Constitution prohibiting states from denying persons within their jurisdiction the equal protection of the laws or the deprivation of life, liberty or property without due process of law is violated by a practice of the governing authorities of the University of Washington, a state institution, giving preference solely on the basis of race to certain persons to the exclusion of others in competition for limited spaces available in the medical school.

B. Whether a practice of the University of Washington wherby white students are required, solely on the basis of race, to meet different and more stringent criteria than are persons of certain other races in obtaining admission to the medical school, violates the Federal Civil Rights Act, Title 42, U.S.C. 2000 (d) which prohibits discrimination or exclusion on the basis or race from any program or activity receiving federal financial assistance.

C. Whether the same practice violates 42 U.S.C. 1983 which prohibits any person, under color of law, from depriving another of any rights, privileges, or immunities secured by the U.S. Constitution.

D. Whether the Fourteenth Amendment of the United States Constitution prohibiting states from denying persons within their jurisdiction life, liberty or property without due process of law is violated by an admissions procedure of the University of Washington Medical School which is arbitrary and/or capricious.

STATEMENT OF THE CASE

Frederick N. McDonald, a 24 year old caucasion, was denied admission to the University of Washington Medical School's entering 1976 class. His prior academic record was outstanding and included a cumulative undergraduate grade point average of 3.58 out of 4.0 and MCAT scores which put him in the top five percent of medical school applicants nationally. As a chemistry major, he was invited to join the Honorary Chemical Society, Phi Lamba Upsilon. Besides academic excellence, Fred McDonald's background included training as a medic in the Washington National Guard and volunteered services as an aide in a convalescent center. The trial court characterized his credentials as "outstanding." V.R. 514, Appendix F.

The University of Washington Medical School, Federally funded, received 1,703 applications for the entering 1976 class. Under the University's enrollment limitations, there were 175 openings allotted to the School of Medicine, although 50 of those were reserved for residents of neighboring states participating in a special program.

While the published criteria for admission to the University of Washington Medical School was racially neutral on its face, the trial court found (Finding 17) that an applicant's race was indeed taken into consideration in the admissions process. In practice, Blacks, Chicanos, and American Indians with basic academic credentials were recruited nationally by the Medical School and were given "extra points" on the interview portion of the selection process which virtually assured their admission. Dr. Lagunoff, one of Fred McDonald's interviewers, testified at the time of trial that Fred would have been given more points on the interview had he been Black:

> Q "Well, he would have been given some positive points, wouldn't he, for being Black?"
> A "Yes, I think that's likely that would have been in his favor. That would have been a consideration in our minds that would favor him, yes." V.R. 232.
>
> "... I would give him some special credit for being a member of a minority group when it came to the overall evaluation." V.R. 233.

Dr. Benjamin Belknap, Chairman of the Admission Committee, offered the principal defense of the "plus points" given to qualified minorities in the interview. He advanced two rationale: (1) "medical manpower needs of the region" (VR 472) (there are few Black, Chicano, and Indian doctors in the area), and (2) racial diversity (VR 477).

> "In a class of 175, diversity will occur just by the sheer numbers. Diversity on almost any other grounds--there are rich and poor students, and there are only children and there are those who have a dozen siblings, there are those who have three years of undergraduate education and those who have Ph.D.'s, there are those who have at the time of entrance to medical school suffered major adversity, grief or illness or what-have-you, and there are those who have not had any exposure along those lines, and there are those who are single, those who are married, and those who are divorced several times.
>
> However one wants to cut it--economic, geographical--a class will sort itself out in terms of diversity in a group of individuals by itself, except for ethnicity." (VR 478).

The selection process at the University of Washington Medical School can be briefly summarized as follows. A numerical "first screen score" is first calculated for each applicant based upon his undergraduate grade point average and MCAT score. A perfect grade point average would give

the applicant 4.0 and a perfect score on the MCAT test would give him an additional 4 points. On a scale of 8, Fred McDonald, for example, received a first screen score of 7.11. Washington residents (and nonresident minorities) having an adequate first screen score are referred to an admissions committee which reviews the applicant's overall paper credentials and in substance determines whether the application should be summarily denied or whether the applicant should be given an in-person interview.

The interview itself is usually about 20 minutes in length. Two faculty members and one medical student participated in Fred McDonald's interview; however, the record shows that there were no set number of interviewers present at each applicant's interview, nor did the same individuals take part in each of the interviews. At the conclusion of the interview, each of the interviewers rates the applicant on a scale from 0 to 4 based on his perception of the applicant's "motivation, maturity, and demonstrated humanitarian qualties." These ratings are then averaged. The results of the interview are kept confidential from the applicant himself and, of course, there is no procedure wherby the applicant can have an administrative review of his interview rating. Fred McDonald received an average score of 2.17 out of a possible 4 points.

At the conclusion of the interview, a "skeletal consideration list" is prepared which establishes a rough order or agenda for consideration of the candidates by the executive committee of the admissions committee. The skeletal consideration list is divided into four categories based entirely on the candidate's score in the interview (Finding 10g). Candidates receiving 3.5 or better in the interview are in category 4, those from 2.5 to 3.5 in category 3, 1.5 to 2.5 in category 2, etc. Applicants are ranked within each of the categories based upon their total score which is derived from adding their first screen score to their interview score.

As a matter of practice, placement in category 4 virtually assures the applicant will be offered an acceptance, while placement in category 2 (as was Fred McDonald) virtually assures that the application will be denied. The interview is therefore the central feature of the selection process.

Fred McDonald, for example, had a higher first screen score than about one-half of the applicants ultimately admitted by the U.W Medical School and a higher first screen score than any of the Blacks, Chicanos, or American Indians who were admitted by the medical school. His name appeared far down the skeletal consideration list, however, because of his relatively poor score on the interview; whereas minority applicants with marginally acceptable academic credentials, but lower first screen scores

were ranked far above McDonald in the skeletal consideration list by virtue of their "extra points" on the interview.

The trial court made no finding that the interview constituted a valid measure of the referenced subjective attributes of motivation, maturity, and humanitarian commitment, nor did it purport to find that these intangibles, even if measureable, were necessary for the practice of medicine.

On the contrary, testified Dr. Thomas Cullen, an educational psychologist from the U.W. Medical School who had written his doctoral dissertation on aspects of the U.W.'s medical admissions program as well as the interview. Cullen summarized the standards by which an applicant's performance might be judged in the interview:

> "By governing principal, I interpreted that to mean a fundamental law that people can go to, and to my knowledge, there is no published governing principal that multiple evaluators could use to measure non-cognitive factors." (V.R. 423).

After McDonald's application was denied, he commenced this action in Superior Court seeking injunctive relief and monetary damages. His complaint was dismissed at the conclusion of plaintiff's case by the trial judge and affirmed on appeal. In the trial (see Plaintiff's Trial Brief p. 11 et seq.) as well as before the Washington State Supreme

Court (see Appellant's Brief p. 15 et seq.), McDonald argued that his rights under the U.S. Constitution and referenced Federal statues had been violated as is reflected in the published opinion of the State Supreme Court. This petition follows.

REASONS FOR GRANTING THE WRIT

This case involves some of the most fundamental rights of citizens under the Federal Constitution, notably the rights to equal and fair treatment.

The importance of the issues raised can be judged from a number of perspectives. While the appeal was initially filed at the intermediate level of Washington's Appellate Courts, the Court of Appeals, on its own motion, certified the case to the State Supreme Court on November 9, 1978. The order provided:

> "An appeal having been filed in this court and the judges of the Court of Appeals, prior to a hearing theron, being of the opinion that the above case, pursuant to RCW 2.06.030 (d), involves fundamental and urgent issues of broad public import requiring prompt and ultimate determination as they relate to Bakke v. University of California Regents, 46 U.S.L.W. 4896 (U.S. June 28, 1978), it is hereby,
>
> Ordered that the above-entitled case is certified to the Supreme Court for such determination as that court deems appropriate."

The Supreme Court's published opinion also recognizes "the public importance of the issue and the likelihood of its recurrence. . ." and purported to establish a precedent of equal importance.

This court has in the past recognized the critical importance of the equal protection issue in the context of so-called affirmative action programs in graduate school admissions. See, e.g. Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) and Defunis v. Odegaard, 416 U.S. 312, 40 L.Ed. 2d 164, 94 S.Ct. 1704, (1974). As illustrated by the case at bar, however, the fundamental questions which motivated this court to accept review of Defunis and Bakke, as well as intimately related issues, have yet to be put to rest--at least in the context of an admissions policy which is racially neutral on its face, but invidiously discriminatory in practice.

The case at bar, however, raises yet another fundamental issue of due process not addressed in either Bakke or Defunis: the interview. The nation's medical schools almost without exception employ the interview in some phase of their selection process. The interview is commonly used in other contexts: not only in the educational, but in the employment field as well. Racial discrimination thinly veiled by an interview purporting to

measure such unknowables as "motivation, maturity, and demonstrated humanitarian commitment" points to the potentially more fundamental problem: the fairness or validity of the interview itself. This court has never condoned arbitrary and capricious administrative adjudicatory action and has in general, at the very least, required that there be a discernable governing principle or standard available to afford the citizen a basis for judicial review of the challenged administrative action in order to protect the fundamental due process. Even absent the racial elements of this case, this latter issue is of such importance that it alone should justify review.

Not only is the case important for the reasons set forth above, but it gives this court the opportunity to clarify the nature of the rights involved so they are not lost in a sea of conceptual confusion.

The State Supreme Court Opinion is in conflict with earlier decisions of this court in numerous respects.

At the outset the opinion appears to premise the availability of relief on equal protection grounds upon a showing that McDonald would have been admitted but for the use of racial criteria. This departs from the same court's conclusion that Marco Defunis had standing to pursue his claim even though he would not have been admitted but for

the racial considerations. See Defunis v. Odegaard, 82 Wn.2d 11, 507 P. 2d 1169 (1973). Under the rule oft announced by this court, the remedy of a person in the disfavored class for equal protection purposes would be to vest him with the privileges of those in the favored class.

> "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Bakke supra, 438 U.S. at 290.

If favored racial minorities are to receive "plus points" on the interview, so to should Fred McDonald.

The State Supreme Court opinion attempts to distinguish Bakke by declaring that the University of Washington program is similar to the "Harvard Plan" referenced in Justice Powell's opinion. The State Supreme Court holds that the state has a "compelling interest" to use racial criteria for the sake of "diversity" and "promotion of integration in public education". What the state court means by "diversity" is not what this Court meant, however. During the course of the trial, the chairman of the admissions committee made it clear that his concern for diversity was racial diversity, as such (see page 5 infra).

This is no more than racial preference for its own sake, an obvious violation of the principles set forth in Bakke:

> "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Bakke, supra, 438 U.S. at 307.

Although the selection process (or, at least, the "selector") was obviously and admittedly racially biased, the trial court and the State Supreme Court refused to adopt the principle set forth in Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975), which would place the burden of proof on the agency to show the validity of their selection process. While the state court opinion attempts to distinguish Albemarle as dealing with employment, it is submitted that there is no difference in principle between a student seeking admittance to medical school and a worker seeking employment or promotion. The trial court made no finding that the selection process was valid and the school made no attempt to prove that it was.

The State Supreme Court decision also substantially departed from the due process requirement "that selections among applicants be made in accordance with ascertainable standards". Holmes v. New York City Housing Authority, 398 F.2d 262 (1968).

The State Supreme Court refused to follow the due process definition of "arbitrary"--"without adequate determining principle" -- U.S. v. Carmack, 329 U.S. 230, 243, 91 L.Ed. 209 (1946), and in effect held that there was no necessity for the university to judge applications on criteria anymore specific or capable of definition than "motivation, maturity, and humanitarian commitment," Nor does the opinion even require that the members of the interview committee agree on the meaning of the term:

> "In short, the fact some qualified applicant are rejected and non-mathematical factors are weighed differently by different interview committee members does not show arbitrary and capricious conduct." 92 Wn 2d at 451.

This language leaves the determination of whether one applicant possesses more "maturity, motivation, and humanitarian commitment" than another applicant entirely up to the interview committee without the possibility of meaningful review. Although the application process purports to be competitive, it cannot be.

> "An examination cannot be classified as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed when necessary by other examiners of equal ability and experience." Fink v. Finegan, 270 N.Y. 356, 1 N.E. 2d 462, 465 (1936).

The trial judge correctly summarized the trial court's inability to review the interview committee's determination:

> ". . . We are just not equipped to second guess their discretionary activity." Appendix F At____

Exactly! However, the "vesting [of] virtually unfettered discretion" in an administrator and his staff "is clearly violative of due process." White v. Roughton, 530 F2d 750, 753-754 (7th Cir. 1976). Nor can ad hoc decisions of administrators be permitted. Morton v. Ruiz, 415 U.S. 199, 232, 39 L.Ed.2d 270, 292, 94 S.Ct. 1055 (1974).

> "Judicial review must operate to insure that the administrative process itself will confine and control the exercise of discretion. The court should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Enviromental Defense Fund v. Ruckelshaus 439 F.2d 584, 594, 598 (D.C. Cir. 1971).

> "In all contexts, the need is a strong one for protection against unnecessarily broad discretionary power, exercised with insufficient protections against arbitrariness." K. Davis, Administrative Law Treatise, 2nd ed. Vol. 2 (1979) p. 162.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted,

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APPENDIX A

DECISION OF THE WASHINGTON SUPREME COURT

[No. 45864. En Banc. August 2, 1979.]

FREDERICK N. McDONALD, *Appellant*, v. JOHN R. HOGNESS, ET AL, *Respondents*.

[1] **Colleges and Universities — Constitutional Law — Equal Protection — Classification — By Race — Admissions Policies.** The consideration of race as a positive factor in the selection of students for admission into a state university program does not violate constitutional equal protection guaranties when there is no quota which removes the member of a particular racial group from competition with all other applicants, and the consideration of race is designed to promote a compelling state interest.

[2] **Colleges and Universities — Constitutional Law — Equal Protection — Compelling State Interest — Racial Balance.** Increasing the diversity of the racial makeup of the student body in a state university, as well as correcting a previous underrepresentation of certain racial groups in designated professions, is a compelling state interest.

[3] **Administrative Law and Procedure — Delegation of Powers — Standards — Sufficiency.** A legislative delegation of authority to adopt standards may indicate what is to be done and who is to do it in general terms when more precise terms are not feasible.

[4] **Administrative Law and Procedure — Delegation of Powers — Review — Sufficiency.** Protection against arbitrary exercise of delegated powers may be provided by administrative practices and informal rules providing procedural safeguards.

[5] **Administrative Law and Procedure — Discretionary Action — Validity — Test.** In order to establish arbitrary and capricious action on the part of an administrative body, a party must show that the action is willful and unreasoning in disregard of facts or circumstances. Discretion exercised honestly is not arbitrary and capricious just because it is believed to be erroneous.

[6] **Colleges and Universities — Admission Practices — Professional Schools.** Subjective factors involving judgmental evaluations may be considered in state professional school admission determinations.

STAFFORD, J., concurs in the result only; ROSELLINI and HOROWITZ, JJ., did not participate in the disposition of this case.

Nature of Action: An unsuccessful applicant to the University of Washington School of Medicine sought to be admitted to the school and to recover damages.

Superior Court: The Superior Court for King County, No. 817562, James J. Dore, J., dismissed the action on June 21, 1977, at the end of the plaintiff's case.

Supreme Court: Holding that the consideration of race in the admission procedure did not deny equal protection, and that the selection process was not arbitrary and capricious, the court *affirms* the judgment.

Richard B. Sanders, for appellant.

Slade Gorton, Attorney General, James B. Wilson, Senior Assistant, and *Steve Milam, Assistant*, for respondents.

WRIGHT, J.—Frederick N. McDonald, an unsuccessful applicant to the University of Washington (U.W.) School of Medicine, seeks admission to the school and damages. In the trial court he alleged that in denying his application for the 1976 entering (E–76) class the school discriminated against him racially in violation of the Fourteenth Amendment,[1] Title 6 of the 1964 Civil Rights Act[2] and 42 U.S.C. 1983.[3] He also asserted that the school's admission process is arbitrary and capricious as was the treatment of his application. The trial judge dismissed the action after McDonald rested his case. McDonald appealed. The Court of Appeals, Division One, certified the case to this court.

[1]U.S. Const. amend. 14, § 1 reads in part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2]Section 601, Title 6 of the 1964 Civil Rights Act (42 U.S.C. § 2000d) states:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[3]42 U.S.C. § 1983 reads:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

There are two major questions. First, does a state medical school's admission policy deny equal protection when it considers race as a factor in evaluating applications? Second, are the admission standards and procedures of the U.W. medical school arbitrary and capricious, and did their application to McDonald constitute arbitrary and capricious action?

For the E–76 year, 1,703 individuals applied, and 175 could be admitted. Of the 175 positions, 50 were earmarked for qualified residents of Alaska, Montana and Idaho under the Washington, Alaska, Montana and Idaho (WAMI) program, a system of regional medical education. *See* RCW 28B.15.225 and RCW 28B.70. Another two seats were earmarked for another special program. Selection factors were set forth in Medical School Admissions Requirements 1976–77, at page 304, as follows:

> Candidates are considered comparatively on the basis of academic performance, medical aptitude, motivation, maturity, and demonstrated humanitarian qualities. Extenuating background circumstances are considered as they relate to these selection factors.

And see Bulletin of U.W. School of Medicine, 1975 and 1976.

Medical school personnel believe grade-point average (GPA) is the best measure of academic performance, while the Medical College Admissions Test (MCAT) score is the best measure of medical aptitude. Noncognitive criteria—motivation, maturity and demonstrated humanitarian qualities—are assessed from the applicant's file and the interview. McDonald, a Washington resident, had a cumulative undergraduate GPA of 3.58 out of 4.0 at the time he applied. He allegedly scored in the top 5 percent nationally

on the MCAT.[4] Though the trial court found McDonald qualified, it said his overall credentials were comparatively average.

The medical school's selection process was aptly summarized by the trial court:

> [T]he Committee on Admissions functions simultaneously at three levels. . . . Generally, the paper credentials of each applicant are reviewed independently by two members of the Admissions Committee. . . . [C]andidates considered potentially competitive . . . are invited to meet with an interview–conference committee. . . . Interview–conference committees evaluate the candidates' paper credentials and the candidates . . . and forward their evaluations to the Executive Committee [EXCOM] of the Committee on Admissions as a part of each . . . application. . . . [The EXCOM], which reviews applicants in the context of the total applicant pool, makes final determinations.

The "first screen" score calculated upon receipt of an application is based on GPA and MCAT. It is the "bright–line" test for referral to the admissions committee and is considered later by admissions committee application readers and interview–conference committee members. Of the 1,703 applicants, 816 were referred to the reading committee. Interviews were granted to 546 applicants considered potentially competitive by reading committee analyses.

The interview–conference committee evaluates the candidate and his paper credentials in terms of published selection factors and identifies strengths and weaknesses. Before each interview–conference, each committee member reviews a copy of the candidate's application file, including letters of recommendation. Members are provided at each session with written guidelines and forms for comments. After the 20– to 30–minute interview the candidate is

[4]

	McDonald's MCAT Scores	Total E–76 Accepted Class Mean MCAT Scores
Verbal	97%	76%
Quantitative	69%	77%
General Information	91%	69%
Science	95%	86%

excused and each member independently places the applicant in one of four categories: (1) Unacceptable (specific deficiencies); (2) Possible (with comparative deficiencies academically and/or with regard to noncognitive features); (3) Acceptable (no deficiencies that are not balanced by other abilities, would be an average medical student); and (4) Outstanding (no apparent deficiencies, high probability of making an excellent physician and scholar). Following each interview–conference, committee staff calculate an average of the individual committee members' ratings based on a scale of 4 for "outstanding" downward through 1 for "unacceptable". The average is entered on the interview–conference summary.

The Skeletal Consideration List (SCL) serves as a rough agenda for EXCOM selection meetings. Placement is determined by one's total score—first screen score plus interview–conference score—grouped again in categories 4, 3, 2 and 1. Placement in category 2 or 1 nearly always leads to application denial. McDonald averaged 2.17 on the interview and was placed in category 2. His SCL position was at the number 237 level. When corrected for "ties" of 546 candidates interviewed for 175 slots, more than 300 placed higher than McDonald. However, every Black, Chicano and American Indian placing higher than McDonald on the SCL had a lower "first screen" score than he did. On April 30, 1976, EXCOM voted that all candidates not otherwise acted upon, which included McDonald, be considered noncompetitive for the E–76 class, and his application was denied.

The first question is whether using race as a positive factor in a state medical school's admission policy and process violates the equal protection clause of the Fourteenth Amendment and section 601, Title 6 of the 1964 Civil Rights Act (42 U.S.C. § 2000d). We conclude that it does not.

At the outset, we note that the evidence shows McDonald would not have been admitted into the E–76 class even absent the six minority persons accepted and without any

consideration of race.[5] This alone is justification for denying relief on equal protection grounds. *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 338, 348 N.E.2d 537, 547, 384 N.Y.S.2d 82, 91 (1976). However, because of the public importance of the issue and the likelihood of its recurrence, we will consider the broader question. Under the Supreme Court majority's analysis in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), if the admission program does not violate the Fourteenth Amendment, it does not violate section 601 of Title 6. *Regents of Univ. of Cal. v. Bakke, supra* at 325. Accordingly, we shall emphasize the equal protection issue.

McDonald states that the U.W. medical school's practice is to admit all qualified minority persons because of race, but not all qualified nonminority individuals. Nonminority candidates are forced to compete with one another for the remaining seats, a "competitive disadvantage." The organizational focus of McDonald's criticism is the interview–conference committee, which purportedly puts the minority applicant with basic credentials (adequate MCAT and GPA) in a position on the SCL which "assures ultimate acceptance". Nonminority individuals with better "first screen" scores than some minority persons are denied "extra points" afforded minority applicants which would

[5]Finding of fact No. 18 states McDonald "would not have been admitted even if all six of the minority applicants [admitted] were removed. Plaintiff McDonald was not on the [18–person] designated alternate list . . ." During redirect examination, Dr. Benjamin Belknap, admissions committee chairman, stated anyone not on the alternate list would not have been admitted. He also indicated that absent any racial consideration or criteria employed, McDonald would not have been admitted. McDonald also had very low placement on the SCL. See page 435.

This case differs from *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), where the University of California conceded it could not meet its burden of showing Bakke would not have been admitted absent the racial preference. There Bakke's overall "benchmark" or total score in 1973, which included GPA, MCAT and subjective elements like letters of recommendation and the interview rating, barely missed the cutoff (see page 437) at the time when four seats reserved for minorities were unfilled. In contrast, McDonald's overall rating—based on the interview and subjective, noncognitive criteria as well as on his objective "first screen" score—is relatively low, as reflected in his placement on the SCL.

place them in favored SCL categories. "If Fred McDonald were Black, he would have gotten a higher score on the interview," appellant declares.

First, McDonald inaccurately describes the U.W. system. As respondent points out and as the record shows, not all qualified minority persons are admitted by the medical school. Seven minority persons ranked higher than McDonald on the 1976 Skeletal Consideration List and were not offered admission. Approximately 30 minority applicants in the interview–conference pool were not offered admission.

Furthermore, analysis of *Regents of Univ. of Cal. v. Bakke, supra*, shows the school of medicine's admission policies and procedures do not violate the equal protection clause of the Fourteenth Amendment.[6] In *Bakke*, the Medical School of the University of California at Davis had two admission programs for the entering class of 100 students—the regular and special programs. A separate committee operated the special program, and selected only minority applicants to fill 16 positions reserved for them.

Bakke, a white male, applied to the Davis medical school in both 1973 and 1974. His application was considered by the general admission program and he was interviewed in both years. In 1973 he had a strong "benchmark" or overall score of 468 out of 500 but no applications with scores below 470 were accepted after Bakke's was completed. In both years, Bakke was denied admission while applicants were admitted under the special program with grade–point averages and MCAT scores significantly lower than Bakke's.

[6]Under *DeFunis v. Odegaard*, 82 Wn.2d 11, 37 n.16, 507 P.2d 1169 (1973), "the equal protection clause of U.S. Const. amend. 14, and the privileges and immunities clause of Const. art. 1, § 12, have the same import" and are applied as one. *Northshore School Dist. 417 v. Kinnear*, 84 Wn.2d 685, 720–21, 530 P.2d 178 (1974); *Markham Advertising Co v. State*, 73 Wn.2d 405, 427, 439 P.2d 248 (1968). Consequently, since the school of medicine's system is constitutional under the federal constitutional provision, it is constitutional under the Washington counterpart.

Bakke sued, seeking admission. He alleged the special admission program excluded him on a racial basis, in violation of his rights under the equal protection clause of the Fourteenth Amendment, the state privileges and immunities clause and section 601, Title 6 of the 1964 Civil Rights Act (42 U.S.C. § 2000d). The trial court held the program violative of both the constitutional and statutory provisions. Ignoring the state constitutional and statutory grounds, the California Supreme Court held the program violated the equal protection clause of the Fourteenth Amendment. *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

Five members of the United States Supreme Court voted to affirm the judgment of the California court ordering that respondent Bakke be admitted to Davis. Mr. Justice Powell based his decision to affirm on a finding the program violated the equal protection clause. Mr. Chief Justice Burger and Justices Stewart, Rehnquist and Stevens avoided the constitutional issue we confront here, holding instead that the university excluded Bakke from participation in its medical education program because of his race in violation of section 601, Title 6 of the 1964 Civil Rights Act (42 U.S.C. § 2000d). Four justices, Brennan, White, Marshall and Blackmun, dissenting, found the admission program valid on the constitutional ground.

Appellant argues that *Bakke* supports his position because here all qualified minority applicants are admitted while nonminority applicants are forced to compete among themselves as in Bakke for the remaining seats. But this admission program significantly differs from that at Davis. Appellant concedes that a quota or target number of minority applicant admissions is not involved. Further, there is not a separate admission system isolating minority persons from competition with nonminority persons as in *Bakke*; the university "gave no separate consideration or separate treatment" to Black, Chicano and American Indian applicants interviewed.

[1] Separate consideration of minority applicants is discouraged by Mr. Justice Powell in his *Bakke* opinion. Under Mr. Justice Powell's opinion, the use of race is impermissible where one group is cut off solely on a racial basis from competition with others. On the other hand, Powell considers the use of race in admissions permissible if it (1) is designed to promote a compelling state interest, and (2) does not insulate an applicant from competition with remaining applicants.

In applying his test, Mr. Justice Powell characterizes as compelling, the goal of the attainment of a diverse student body stressing that the freedom to select a student body is an element of academic freedom, a special First Amendment concern.[7] *Regents of Univ. of Cal. v. Bakke, supra* at 312. He explains that this diversity encompasses a broad array of qualifications and characteristics of which racial origin is a single element. *Regents of Univ. of Cal. v. Bakke, supra at 314.* He concludes from the experience of other university admission programs which take race into account in achieving diversity that the assignment of a fixed number of places to a minority group is not necessary. *Regents of Univ. of Cal. v. Bakke, supra* at 316.

[7]The University of Washington argues that the denial of McDonald's application was an exercise of its constitutionally protected freedom to decide who shall be admitted to study. It quotes Mr. Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 1332, 77 S. Ct. 1203, 1218 (1957), also quoted by Mr. Justice Powell in *Bakke*, at 438 U.S. 312:

> "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

Mr. Justice Powell also relies on *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 640, 87 S. Ct. 675, 683 (1967), where the court noted a national commitment to safeguarding an academic freedom

> of transcendent value to all of us and . . . therefore a special concern of the First Amendment . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues . . ."

Like Mr. Justice Powell, we believe that the atmosphere of "speculation, experimentation and creation" is promoted by a diverse student body. We agree that in seeking diversity, the UW medical school must be viewed "as seeking to

In *dicta*, Mr. Justice Powell indicates that the Harvard admission plan, which like the plan here employs race as an admission factor, furthers a compelling state interest in diversity of the student body. *Regents of Univ. of Cal. v. Bakke, supra* at 316–18. Justices Brennan, White, Marshall and Blackmun also found the Harvard plan constitutional under their approach. *Regents of Univ. of Cal. v. Bakke, supra* at 326 n.1. Thus, a majority of the court find constitutional a plan without a quota or separate consideration for minority groups but where race may be a beneficial factor. The University of Washington School of Medicine's admission policies and procedures have the same redeeming characteristics.

[2] McDonald argues there is no finding the classification here serves a compelling or substantial interest, or is necessary to realize such an interest. As respondent emphasizes, however, both in seeking diversity[8] and in fulfilling the *DeFunis* mandate of "promoting integration in public education," the school of medicine has a compelling state interest permitting consideration of race. The Washington plan also fulfills the second element of Mr. Justice Powell's test. The system assures competition among applicants, thereby avoiding "denial of individualized consideration," the principal evil of the Davis plan. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52, 57 L. Ed. 2d 750, 789 n.52, 98 S. Ct. 2733, 2763 n.52 (1978).

achieve a goal that is of paramount importance in the fulfillment of its mission." *Regents of Univ. of Cal. v. Bakke, supra* at 313. But though a university must have wide discretion in making admission judgments, "constitutional limitations protecting individual rights may not be disregarded." *Bakke*, at 314.

[8]Finding of fact No. 15, not challenged by McDonald, indicates a purpose of promoting diversity in the student body and not just a purpose of serving medical needs of the region:

> Consistent with overall University of Washington policy, the University's School of Medicine and its faculty have determined that *in order to best serve the educational needs of the medical school* and to better serve the medical professional needs of this region, it is essential that the school of medicine should seek greater representation of certain minority groups in its classes *where there has been serious under-representation in the school* and in the medical profession. . . . The medical school and its faculty have also determined that some members of minority groups may have suffered cultural and educational disadvantages by virtue of their ethnic background, and have determined that such disadvantages are properly to be considered when evaluating the overall qualifications of such an applicant.

(Italics ours.)

McDonald's claim that admissions committee chairman Belknap's testimony shows a purpose of serving regional medical manpower needs and not a purpose of promoting educational diversity is unsupported by the record. The record also refutes the contention Belknap was not referring to diversity in Powell's broad sense, which involves consideration of race in conjunction with other attributes.

In the second *Bakke* opinion which supports the U.W. medical school on this issue, Justices Brennan, White, Marshall and Blackmun pronounce the Davis program constitutionally valid. In their opinion, the state need only show the racial criteria (1) serves an important, articulated purpose, (2) does not stigmatize any discrete group, and (3) is reasonably used in light of the program's objectives. *Regents of Univ. of Cal. v. Bakke, supra* at 361. The Brennan group believes Davis' goal of admitting students disadvantaged by effects of past discrimination is sufficiently important. They reasonably read Mr. Justice Powell's opinion as agreeing this can constitute a compelling purpose. *Regents of Univ. of Cal. v. Bakke, supra* at 366 n.42.

In *DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169 (1973), this court rejected the argument that a state law school violated equal protection rights by denying plaintiff admission, yet accepting minority applicants with lower objective indicators than plaintiff. We stressed gross underrepresentation in law schools and the legal profession in finding an overriding interest in promoting integration in public education. We held the interest in eliminating racial imbalance within public legal education is compelling. *DeFunis v. Odegaard, supra* at 33.[9]

[9]The United States Supreme Court granted certiorari, *DeFunis v. Odegaard*, 414 U.S. 1038, 38 L. Ed. 2d 329, 94 S. Ct. 538 (1973), but later declared the case moot and refused to decide the constitutional issue. *Defunis v. Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974). On remand, a plurality of this court reaffirmed its previous judgment. *DeFunis v. Odegaard*, 84 Wn.2d 617, 529 P.2d 438 (1974).

In the instant case the trial court determined the school had decided that in order to serve the educational needs of the school and the medical needs of the region, the school should seek greater representation of minorities "where there has been serious underrepresentation in the school and in the medical profession." Thus, the program furthers a compelling purpose of eliminating racial imbalance within public medical education.

Furthermore, the program here meets the additional elements of the Brennan group's test. The racial classification does not stigmatize any discrete group and is reasonably used in light of its objectives.

As noted by Mr. Justice Powell in *Bakke* and by this court in *DeFunis*, it is not enough that a state can show that its purpose is substantial or compelling. The use of race, a suspect classification, must be necessary to the accomplishment of its purpose. *Regents of Univ. of Cal. v. Bakke*, *supra* at 305; *DeFunis v. Odegaard*, 82 Wn.2d 11, 32, 507 P.2d 1169 (1973); *Nielsen v. State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978). Though the Davis plan failed this element of Powell's test in *Bakke*, he indicated that a program under which race is but one factor in achieving diversity would survive it. In addition, this court found necessary in *DeFunis* a law school admissions policy which provided that minority applicants were compared to one another but not with nonminority applicants. Since the program here does not involve consideration of minority applicants apart from others, it appears to meet both the Powell *Bakke* and *DeFunis* standards of necessity.

The University of Washington School of Medicine admissions program survives both the Powell and Brennan group tests. Moreover, a majority of the *Bakke* court stated race may be a factor in a state medical school's admissions program. Justice Powell joined the Brennan group in reversing the portion of the California court's judgment enjoining Davis from considering the race of any applicant. *Regents of Univ. of Cal. v. Bakke*, *supra* at 326. Thus, the *Bakke* majority followed the lead of this court which held

in *DeFunis* that "consideration of race as a factor in the admissions policy of a state law school is not a per se violation of the equal protection clause of the Fourteenth Amendment." *DeFunis v. Odegaard*, *supra* at 31. *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

Finally, McDonald asserts that Mr. Justice Stevens' opinion, in which Mr. Chief Justice Burger, and Justices Stewart and Rehnquist joined, would not even permit "racial discrimination" under the Harvard plan. By implication, in appellant's view the Stevens opinion condemns the U.W. medical school's program, which also uses race as one of many admission factors. As indicated earlier, however, a majority said the Harvard approach is constitutional. Stevens relied exclusively on the federal statute, avoiding the constitutional issue. The Stevens group held only that the Davis medical school excluded Bakke from its program of medical education in violation of section 601, Title 6 of the 1964 Civil Rights Act (42 U.S.C. § 2000d). We think the substantial differences between the Davis and U.W. programs render the Stevens holding inapplicable. Here, there was not a quota excluding McDonald from competing for a certain group of seats.

The University of Washington School of Medicine's admission policies and procedures survive the *Bakke* Powell and Brennan equal protection tests, using race as an admission factor in a manner permitted under both *Bakke* and *DeFunis*. Accordingly, we hold that the use of race in these policies and procedures does not offend the equal protection clause of the fourteenth amendment to the United States Constitution.

McDonald's second major argument is that the medical school's admission policies and procedures are arbitrary and capricious and that their application to him constituted arbitrary and capricious action. As part of this argument, he urges that the delegation of authority to the Board of Regents to set admission requirements denies due process and violates equal protection rights under U.S. Const.

amend. 14 and Const. art. 1, § 12 because it contains no standards prescribing how that authority is to be exercised. Under *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972) and subsequent cases, the delegation survives our scrutiny.

In *Barry & Barry*, this court found a constitutional delegation in authority given to the director of the Department of Motor Vehicles to approve fee schedules and set maximum employment agency fees. Discarding the requirement of specific legislative standards, we held:

> [T]he delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that *procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.*

Barry & Barry Inc. v. Department of Motor Vehicles, *supra* at 159.

Applying the first part of the test, the court concluded that RCW 19.31.070—which provides for the director's issuance of reasonable rules and regulations to enforce the Employment Agency Act—was clear in indicating the rules could be issued administratively, and specifically by the director of the Department of Motor Vehicles. As to the second element, we found adequate procedural safeguards in administrative procedures act provisions providing that interested parties will be heard before rule adoption and for judicial review to protect against arbitrary and capricious administrative action. Noting the power delegated did not admit of precise standards, we held that the director-promulgated schedule of employment agency maximum fees was a valid and constitutional delegation of legislative power.

[3] Distinguishing *Barry & Barry*, appellant urges that here "the legislature has provided no standards or guidelines whatsoever, specific, general or otherwise . . ." Contrary to McDonald's assertion, the legislature has provided, within *Barry & Barry's* meaning, standards which define in general terms what is to be done and the administrative body to accomplish it. RCW 28B.10.050 specifically states the regents shall determine entrance requirements. Under RCW 28B.10.528, the regents are authorized to delegate to the university president or his designee any of their powers and duties.[10] RCW 28B.20.130 lists—as a general power and duty of the regents—establishment of entrance requirements. That section goes on to suggest the manner in which that authority should be exercised, providing: (1) completion of examinations may be a prerequisite to admission; (2) evidence of completion of high school or other educational institutions whose programs meet university approval may be a requirement. As in *Barry & Barry*, it is doubtful whether the task delegated is susceptible to more precise standards. Requirements in general terms may suffice when the subject matter will not admit of more specific standards. *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255, 258, 534 P.2d 33 (1975).

[4] The more difficult question is whether the second element of the *Barry & Barry* test is met. Do procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power? In *Barry & Barry*, administrative procedures act provisions ensured interested parties would be heard before rule adoption, as well as judicial review against arbitrary and capricious action. In subsequent cases, we repeatedly have found adequate procedural safeguards in provisions for

[10]Pursuant to RCW 28B.10.528, the power and duty to establish entrance requirements has been delegated to the U.W. school of medicine. Furthermore, WAC 478-160-095 states that the dean of the school of medicine is responsible for interpretation and administration of regulations governing admission of medical students.

judicial review of an agency's decision. *United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 578 P.2d 38 (1978); *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978); *Spokane v. Spokane Police Guild*, 87 Wn.2d 457, 553 P.2d 1316 (1976).

RCW 28B.19, the State Higher Education Administrative Procedure Act, applies to the U.W. Board of Regents and to the medical school but exempts admission policies from rulemaking provisions, including notice and publication requirements.[11] There is not any other provision providing for judicial review of decisions of the executive committee of the committee on admissions. Nevertheless, committee decisions are subject to review as they were in *DeFunis* and the present case on the ground the committee acted arbitrarily and capriciously. The decisions are also subject to review for abuse of discretion. *See, e.g., Wilson v. Board of Governors*, 90 Wn.2d 649, 585 P.2d 136 (1978). *And see State ex rel. Bartlett v. Pantzer*, 158 Mont. 126, 489 P.2d 375 (1971) (holding denial of admission to state law school was abuse of discretion). In *Spokane v. Spokane Police Guild, supra*, we held that a statute providing for superior court review of whether an arbitrator's decision was arbitrary or capricious constituted an adequate procedural safeguard under *Barry & Barry*. Accordingly, the opportunity for limited review—even in the absence of a special statute—suffices.

In *Polygon Corp. v. Seattle, supra*, this court looked for safeguards in the underlying statutes, ordinances and practices of the City of Seattle. Here a review of medical school practices shows procedural safeguards. First, basic admission criteria are published and applied at all levels of the process. Competitive applicants are subject to three-tiered

[11]RCW 28B.19.020(2) excludes from the definition of rule any "rules, regulations, orders, statements, or policies relating primarily to . . . Standards for admission; academic advancement, academic credits, graduation and the granting of degrees". That provision concludes that "such matters need not be established by rule adopted under this chapter unless otherwise required by law."

review involving a minimum of several admissions committee members. At the interview-conference level, interviewers are trained and familiarized with applicant files beforehand. They are provided with guidelines, including the admission criteria, and evaluation sheets to ensure some consistency in the manner in which interviews are conducted and appraised. These and other school of medicine procedures described below support our holding there are sufficient procedural safeguards to avoid arbitrary administrative action and abuse of discretion.

[5] We now turn from the standards issue to the broader question of whether the admission policies and procedures are arbitrary and capricious and whether the process leading to the denial of McDonald's application was the same. In *DeFunis*, plaintiff similarly contended law school admissions procedures constituted arbitrary and capricious action. We applied the long-standing test:

> Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.
>
> *DuPont-Fort Lewis School Dist. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971).

DeFunis v. Odegaard, 82 Wn.2d 11, 38, 507 P.2d 1169 (1973). Plaintiff must carry the burden of proof on this issue. *State ex rel. Longview Fire Fighters Local 828 v. Longview*, 65 Wn.2d 568, 572, 399 P.2d 1 (1965).

[6] McDonald first states that the published selection criteria do not provide a standard for admission or rejection. He singles out for criticism the subjective factors, motivation, maturity and demonstrated humanitarian qualities; he argues these are not definable, meaningful concepts which can be reasonably applied. *DeFunis* indicates, however, that consideration of subjective factors, or

factors involving judgmental evaluation, is permissible in state professional school admissions.

Contrary to McDonald's assertion, the findings adequately support the trial court's conclusion the selection process is not arbitrary and capricious. As in *DeFunis*, the record indicates both the admissions committee and the interview–conference committee employ predetermined standards and procedures for selection. Before participating in an interview–conference, each admissions committee member serves on the reading committee to acquire experience in evaluating application files. Application readers work from a "screening" worksheet, and spend approximately 20 to 30 minutes evaluating several aspects of each application: (1) the difficulty of the applicant's undergraduate program; (2) MCAT variables; (3) outside activities; (4) motivation for medicine; (5) maturity; (6) letters of recommendation; (7) special considerations, including extenuating circumstances.

Before participating in an interview–conference, admissions committee members also attend a training session conducted by admissions committee chairman Belknap. During this session they are provided with copies of the Association of American Medical Colleges Medical School Requirements book, the School of Medicine bulletin, a screening worksheet, guidelines for interviews and a completed application to review at that session. They also are instructed on evaluating application files. If a committee member is absent, an individual meeting is scheduled with Dr. Belknap which lasts more than an hour.

At the interview–conference level, each trained interviewer is required to read his or her personal copy of each application including the letters of recommendation, before the interview–conference. Each member spends approximately 30 minutes per review and makes notes on the application regarding areas for inquiry during the interview–conference. Guidelines given to each interviewer at each interview–conference session include: (1) a list of selection criteria; (2) MCAT and GPA mean averages for

the previous year's entering class; (3) suggested guidelines for evaluation of motivation, maturity, humanitarian qualities and candidate strengths and weaknesses; (4) MCAT–suggested areas of noncognitive assessment; (5) suggested areas for discussion; (6) suggested areas for observation. The members of the interview–conference committee rate the candidate comparatively on the basis of the selection criteria, the application file and the interview.

McDonald's application was read by Dr. Belknap and a student committee member and was rated competitive by both. Subsequently, McDonald was interviewed for 22 minutes by an interview–conference committee comprised of two faculty members and one student. Each interviewer independently placed McDonald in category 2, indicating he was a possible candidate "with comparative deficiencies academically and/or with regard to noncognitive features." The interview–conference committee forwarded McDonald's application to the executive committee. That committee at its April 30, 1976, meeting voted that all candidates not acted upon be considered noncompetitive, subject to Chairman Belknap's review of the applications of interviewed candidates remaining. Belknap reviewed the remaining applications, including McDonald's. He reported to the committee that in his judgment there were not any applicants the committee would be likely to consider more competitive than those previously admitted, or made alternates, based upon committee guidelines. A May 10, 1976, letter notified McDonald his application was denied.

The foregoing standards and procedures consistently utilized and also used in evaluating McDonald's application cannot be characterized as "willful and unreasoning, without consideration," or as exercised without "due consideration."

It is further argued that McDonald would have been admitted based on his combined GPA and MCAT ("first screen") score but was not because of his score in an interview with no demonstrated validity in measuring the three

remaining selection factors. As respondent notes, the plaintiff's claims in *DeFunis* were similar. There plaintiff contended that using subjective, nonmathematical factors and weighing them differently for different applicants arbitrarily denied admission. This court declared that the exercise of judgment in evaluating an applicant's file is not arbitrary and capricious action. We explained:

> The fallacy of plaintiff's argument is the assumption that, but for the special consideration given minority applicants, selection decisions by the committee would have been based solely upon objective, measurable mathematical projections of the academic performance of applicants. Actually, although the PFYA [based on GPA and LSAT] was a very important factor, it was not the sole determinative factor for the group of students. Rather, the committee utilized the PFYA as a starting point in making its judgment . . :

DeFunis v. Odegaard, supra at 41.

Here, like in *DeFunis*, the score based on GPA and MCAT is not the sole criteria but instead is a starting point for consideration. Relevant subjective criteria—motivation, maturity and demonstrated humanitarian qualities—are specified in the medical school admissions book. As in *DeFunis*, letters of recommendation and the difficulty of an applicant's undergraduate program also are considered. Outside activities and extenuating circumstances are factors. The information in each applicant's file is evaluated by interview–conference committee members in light of the specified criteria and is included in their ratings. In *DeFunis* this court said, "Law school admissions need not become a game of numbers; the process should remain sensitive and flexible, with room for informed judgment in interpreting mechanical indicators." *DeFunis v. Odegaard, supra* at 42. *See also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313–18, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) and *DeFunis v. Odegaard*, 416 U.S. 312, 340, 40 L. Ed. 2d 164, 182, 94 S. Ct. 1704, 1717 (1974) (Douglas, J., dissenting) (law school not bound by mechanical criteria). In short, the fact some qualified applicants are rejected and

nonmathematical factors are weighed differently by different interview committee members does not show arbitrary and capricious conduct.

The university has broad discretion in admission decisions and may use subjective, noncognitive criteria. The Board of Regents alone is given authority that it may delegate to set admission requirements. Regulations and policies relating to admissions are exempt from rulemaking provisions of the State Higher Education Administrative Procedure Act. Thus, it is evident that the legislature intended to vest broad discretion in the university on admission matters.[12] Other courts justified nonintervention both upon a university's broad discretion in admission decisions and upon an analogy to cases involving academic standards.[13] Like the Montana court's stance in *State ex rel. Bartlett v. Pantzer*, 158 Mont. 126, 489 P.2d 375 (1971), we generally favor nonintervention in admission decisions but nevertheless will continue to review them for arbitrary and capricious action and abuse of discretion.

Finally, McDonald argues that since racially discriminatory criteria are used, the university must demonstrate that

[12] *See Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 540, 384 N.Y.S.2d 82 (1976).

[13] *See, e.g., State ex rel. Bartlett v. Pantzer*, 158 Mont. 126, 489 P.2d 375 (1971) (analogy to grade case) and *Timmerman v. University of Toledo*, 421 F. Supp. 464 (N.D. Ohio 1976) (there is no reason to distinguish between requirements for entry or completion of study).

In *Bakke*, Mr. Justice Blackmun stressed the universities' expertise and the judiciary's comparatively poor training in admissions in reaching his conclusion that judicial interference must be the exception rather than the rule. *Regents of Univ. of Cal. v. Bakke, supra* at 404 (Blackmun, J.). His statements are consistent with the court's opinion in *Board of Curators v. Horowitz*, 435 U.S. 78, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978), where the court rejected a procedural due process challenge to an academic dismissal for failure to meet academic standards:

> Like the decision of an individual professor as to the proper grade . . . the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Board of Curators v. Horowitz, supra at 90.

See also Wong v. Regents of Univ. of Cal., 15 Cal. App. 3d 823, 93 Cal. Rptr. 502 (1971) (court not qualified to pass on attainment of medical student).

the selection process is a valid predictor of the qualities sought (the published criteria) and that these criteria are a valid index to a successful physician. He relies on two cases interpreting Title 7 of the 1964 Civil Rights Act, which are concerned with discriminatory employment tests. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). There is no basis for applying these Title 7 cases here. As respondent points out, they are concerned with employment and do not set standards for arbitrary and capricious action in medical school admissions.

McDonald has not shown that the policies and procedures of the University of Washington School of Medicine are arbitrary and capricious. There has not been willful and unreasoning action, without consideration and in disregard of facts or circumstances.

Because McDonald is not entitled to relief, the question of whether the trial court erred in concluding he is not entitled to monetary damages has not been addressed.[14]

The decision of the trial court is affirmed.

UTTER, C.J., BRACHTENBACH, DOLLIVER, HICKS, and WILLIAMS, JJ., and HENRY and RYAN, JJ. Pro Tem., concur.

STAFFORD, J., concurs in the result.

[14]In addition, we have not discussed McDonald's claim that the U.W. medical school's national recruitment of minority applicants violates WAC 478-160-125, which before a July 18, 1978, amendment stated the medical school "gives primary preference in admissions" to qualified Washington residents. Finding of fact No. 11, however, states that 120 of 123, or 97.6 percent of the positions available after the WAMI and other special exclusion, were filled by Washington residents.

APPENDIX B
JUDGMENT OF WASHINGTON SUPERIOR COURT FOR KING COUNTY

NO. 817562
McDONALD v. HOGNESS
JUDGMENT OF DISMISSAL

THIS MATTER having come on regularly for trial before the undersigned judge of the above-entitled court, sitting without a jury, and a trial having commenced on May 9, 1977 and ending on May 17, 1977, and the plaintiff having presented his case in chief, and plaintiff having rested his case, and the defendants having moved for a dismissal of the plaintiff's Complaint, and the court having orally granted said Motion for Dismissal, and the court having heard argument and denied plaintiff's Motion for Reconsideration, and the court having heretofore entered its Findings of Fact and Conclusions of Law, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint is dismissed

with prejudice as to all defendants, and defendants are awarded their costs and disbursements to be taxed herein.

DONE IN OPEN COURT this 21 day of June, 1977.

James J. Dore
Judge

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF WASHINGTON SUPERIOR COURT FOR KING COUNTY

NO. 817562

McDONALD v. HOGNESS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Commencing on May 9, 1977, at 9:30 A.M., a hearing was held before the Honorable James J. Dore, Judge of the above-entitled court, sitting without jury, and continued through 10:45 A.M. on May 17, 1977. The plaintiff was represented by RICHARD B. SANDERS and the defendants were represented by Slade Gorton, Attorney General of the State of Washington, Steve Milam, Assistant Attorney General, and David L. Martin, Special Assistant Attorney General.

On June 21, 1977, at 8:45 A.M., a further hearing was held before the Honorable James J. Dore, Judge of the above-entitled court, to consider plaintiff's Motion for Reconsideration of this court's oral decision announced on May 17, 1977. At that time the court also considered the defendants' presentation of the proposed Findings of Fact and Conclusions of Law.

The court having heard the testimony of the witnesses, having fully considered all the evidence presented in the presentation of plaintiff's case, the records and files herein, having rendered its oral decision on May 17, 1977, and having denied plaintiff's Motion for Reconsideration, now makes the following:

FINDINGS OF FACT

I.

Plaintiff is 24 years old, male, single, and of the Caucasian race. He is a Washington resident and has been such all of his life. He presently resides in Bothell, Washington.

II.

Plaintiff obtained his elementary and secondary education in the State of Washington graduating from Inglemoor High School in June, 1971. He attended the University of Washington commencing in September, 1971, and at the time of his making application to the University of Washington School of Medicine he had a cumulative grade point average of approximately 3.58 out of a possible 4.0.

III.

Defendants are John R. Hogness, President of the University of Washington, Dr. Robert L. Flennaugh, George V. Powell, James R. Ellis, R. Mort Frayn, Mrs. William H. Gates, Jack G. Neupert, and Robert S. Philip comprising all the members of

the Board of Regents of the University of Washington at the time this action was commenced on September 13, 1976; Dr. Robert Van Citters, Dean of the University of Washington School of Medicine, Dr. Benjamin H. Belknap, former Chairman of the Admissions Committee and former Assistant Dean for Admissions of the University of Washington School of Medicine, W. W. Washburn, Registrar of the University of Washington, and the University of Washington, a state-owned and state-operated educational institution.

IV.

Governance of the University of Washington and all of its various schools, colleges, and departments is vested by the legislature in a seven-member Board of Regents, appointed by the governor and confirmed by the state senate. The Board of Regents in turn has appointed a president of the University, who serves as the chief executive officer of the institution. The Regents have delegated authority for the establishment of admissions standards and procedures to the President of the University, who, in turn, has further delegated this responsibility to the deans of the various schools and colleges.

In the University's School of Medicine, the delegated responsibilities for medical school student admissions are carried out under the general authority of the dean of said school, by a faculty

committee on admissions, which was chaired by an Assistant Dean for Admissions, Dr. Benjamin H. Belknap. The selection process is handled by an Executive Committee of the Committee on Admissions, also chaired by Dr. Benjamin H. Belknap, the Assistant Dean for Admissions, together with several separate interview-conference committees. The Committee on Admissions is the largest standing committee of the medical school, and, for the entering 1976 class (E-76) admissions year, it was composed of 24 full-time members of the School of Medicine faculty (14 from clinical departments and 10 from basic science departments), 7 practicing physicians and four medical students from each class for a total of 47 members. The final admissions decisions are made by the Executive Committee of the Committee on Admissions, consisting of the Assistant Dean for Admissions, members of the medical school faculty and a student. Members of the Executive Committee generally serve as chairpersons of the interview-conference committees which met on an average of four afternoons weekly from November of 1975 through April, 1976, in connection with the selection of the E-76 class. Defendant Dr. Benjamin H. Belknap was at all times material to this suit, the Chairman of the Committee on Admissions and Assistant Dean for Admissions at the University of Washington School of Medicine.

V.

Faculty effort expended in committee work associated with the selection of the members of the E-76 class was almost 4,500 faculty hours (with nearly 2,000 hours devoted solely to interview-conference committee work and the interviewing of applicants). That amount of time represents a commitment which exceeds the effort that will be expended by the School of Medicine faculty in teaching the members of the E-76 class during their first two years of medical school.

VI.

Both nationally and locally, far more individuals qualified for admission as medical students apply than can possibly be accepted. On a national basis for the E-76 class approximately 42,500 individuals filed applications for admissions to the nation's medical schools, approximately 15,700 who are enrolled and approximately 26,800 were not accepted for admission. Of the latter group, it was estimated that nearly half or 13,400 could be considered fully qualified for the study of medicine. There are 117 medical schools presently established in this country. [Deleted by trial judge]: ~~To accommodate the annual 13,400 qualified applicants who are not admitted to medical schools, an additional 100 medical schools would have to be constructed and staffed at a cost of $100,000,000 per medical school and a wait of 10~~

~~years before each such new school could become fully operational.~~

VII.

For the E-76 class at the University of Washington, 1,703 individuals applied for a medical school class which numbers only 175 students. Of those 175 positions, 50 positions were targeted for allocation to qualified residents of Alaska, Montana, and Idaho. The allocation of these positions to Alaska, Montana, and Idaho residents is as a result of the formalization of the WAMI (Washington, Montana, and Idaho) program, which permits the use of facilities at the University of Washington, University of Alaska, Montana State University, the University of Idaho, and Washington State University for a portion of the training of part of the students admitted to the University of Washington School of Medicine. This program in regionalized medical education has been authorized by the legislature and, pursuant to agreements entered into with each of the participating states and their participating institutions, permits additional seats in the school to be filled by residents of the participating states at a cost paid for entirely by the participating states, and with the aforementioned use of educational facilities within those states. Two positions were allocated to Medical Scientist Training Program (MSTP), the M.D.-Ph.D. program, of the School of Medicine. Of the remaining

123 positions, 120 or 97.6% were Washington residents.

VIII.

The selection process at the University of Washington School of Medicine is a continuing one, commencing no later than September 1st of each year and ending following completion of the process of composing an entire first year medical school class, usually in June or July of the following year. The admissions year for the E-76 class was considered formally closed in June of 1976 although the final annual written report to the medical school Executive Committee by the chairperson of the Committee on Admissions was submitted in September, 1976. Admissions activity, however, occurs on a year-round basis.

IX.

Basically, the Committee on Admissions functions simultaneously at three levels in selecting a class. Generally, the paper credentials of each applicant are reviewed independently by two members of the Admissions Committee, each making independent assessments as to the competitiveness of the candidates. Those candidates considered potentially competitive for the positions available then are invited to meet with an interview-conference committee consisting of three to five members of the Committee on Admissions in an interview-conference. Interview-conference committees evaluate

the candidates' paper credentials and the candidates as they participate in the interview conference, and forward their evaluations to the Executive Committee of the Committee on Admissions as a part of each candidates' total application, and recommends either: (a) that the applicant be reinterviewed; (b) that his application be deferred for further consideration; (c) that the applicant is noncompetitive, or (d) that the file be referred for possible review by the Executive Committee. The Executive Committee, which reviews applicants in the context of the total applicant pool, makes final determinations regarding offers of acceptance.

X.

The specific steps in the selection process are as follows:

(a) The School of Medicine participates in the application process conducted by the American Medical College Application Service (AMCAS). The applications received by the University include such information as an undergraduate transcript, grade point average, scores obtained on the required Medical College Admissions Test (MCAT), an applicant's self description, autobiographical data provided by applicants, letters of recommendation, as well as such other information as the applicant may wish to submit. Upon receipt of the AMCAS applications at the School of Medicine, the committee staff prepared a folder for each applicant

from Washington, Alaska, Montana, and Idaho, and regardless of residence M.D.-Ph.D. candidates and those designating themselves as Black Americans, American Indians, and Mexican Americans. No folders are prepared for other applicants. The committee staff acknowledges to the applicant receipt by the School of Medicine of the AMCAS application, indicates what materials are lacking (usually letters of recommendation and/or autobiographical statements) before an application can be considered complete, and requests additional submission by the candidate of a form indicating from whom letters of recommendation may be expected. The cover of each folder is used to record dates of receipt of materials and of mailing of notifications, authors of letters of recommendation, residency designated, etc. and itself serves in part as a flow sheet of an application from time of receipt to final action. The candidate again is notified when an application is considered complete and ready for committee review.

(b) Calculations of "first screen" score. Upon receipt of AMCAS application, the Committee on Admissions staff calculates from the academic record and MCAT scores a "first screen" score which (1) reduces to a single number and the many components of traditional GPA and MCAT reporting, (2) gives increasing weight to a candidate's academic performance as he or she has progressed

through the undergraduate years, and (3) emphasizes, by weighing the mathematics and science portions of the MCAT. The formula for this calculation is as follows:

(1st yr. GPA) + (2nd yr. GPA x 2) +
(3rd yr. GPA x 4) = X
sum of undergraduate years
[(VA percentile) + (Q.A. percentile x 2) +
(GI percentile) + (SC percentile X 4 x .005 = Y
X + Y = First Screen Score (FFS)

Such scores are reported on a scale of 0 to 8 (0 to 4 for adjusted GPA) + (0 to 4 for converted and weighted MCATs)

In plaintiff's case, the FSS of 7.22 was derived by the following calculation:

Freshman Cum GPA	3.47 x 1 =	3.47
Sophomore Cum GPA	3.44 x 2 =	6.88
Junior Cum GPA	3.71 x 3 =	11.13
	6	21.48 = 3.58
Verbal MCAT %	97 x 1 =	97
Quantitative MCAT %	69 x 2 =	138
General Infor %	91 x 1 =	91
Science MCAT %	95 x 4 =	380
	760 x .005 =	3.53
	First Screen	7.11

(c) Reading Committee. A minimum of two members of the Committee on Admissions independently assess the completed application of each candidate referred for reading. The completed application to be reviewed includes not only all materials contained in the AMCAS application, but also an

autobiographical statement, if a candidate chooses to use the "personal comments" section of the AMCAS for other purposes, and letters of recommendation. All correspondence, including "update" letters and/or supplemental transcripts, as well as all materials relating to previous applications, are included in the materials presented for review. A committee staff has previously indicated with arrows approximate points on the reported academic records at which MCATs have been taken.

In general, applications are to be assessed on the basis of selection factors which have been published in the Medical Schools Admissions Requirements book in the University of Washington School of Medicine bulletin. These selection factors are that

> "Candidates are considered on the basis of academic performance, medical aptitude, motivation, maturity, and demonstrated humanitarian qualities. Extenuating background circumstances are considered as they relate to these selection factors."

In more specific terms, readers are provided with worksheets which guide their evaluations in assessing the difficulty of an applicant's program, MCAT variables, outside activities, motivation for medicine, letters of recommendation, and extenuating circumstances. Readers are asked to "score" almost all of the variables described. Such

scoring is asked of the readers in order that they commit themselves on each particular item of analysis, and also to provide a "total score" meaningful to the individual reader in the context of the other applications he or she has evaluated in a similar fashion. Thus, the total score based on review of paper credentials is used only to assist the reader in reaching an overall conclusion as to whether a candidate appears to be unquestionably competitive, competitive, possibly competitive, unlikely to be competitive, or essentially non-competitive.

If the independent evaluation of paper credentials differs markedly between the two assigned readers, a third member of the Committee on Admissions will independently assess the file. Those candidates whose paper credentials suggest that they are "unquestionably competitive" or "competitive" are usually invited to meet with members of the committee in the interview conferences. Of the 1,703 applications received for the E-76 class, approximately 816 were referred to the reading committee. Of these, interviews were recommended for and granted to 546 applicants considered potentially competitive for positions available based on the analysis of the reading committee. Scheduling of such interviews was arranged by Admissions Committee staff.

(d) Interview-Conference Committees. Excluding early decision program interviews, which must be conducted during the month of September, interview-conference committees met on an average of four afternoons weekly between November 25, 1975 and April, 1976, in connection with the selection of the E-76 class. An average of four to five candidates were seen each afternoon. The number of committee members present at each such interview-conference for the E-76 year varied from three to four with a few candidates having five committee members. Admissions committee members present at each such conference have had prior access to and studied for approximately half an hour each in advance, photocopies of AMCAS applications, autobiographical statements and letters of recommendation usually provided to the conference members four to seven days prior to the interview-conference session. Chairpersons of each interview-conference also have at their disposal each applicant's complete file. A brief committee discussion is generally held just before inviting a candidate to join the conference.

(e) A candidate's time with the committee begins in the early afternoon when all of the candidates to be interviewed that particular day meet in the interview-conference room with the Chairman of the Interview-Conference Committee and are provided a brief orientation as to the nature and

structure of the interview-conference. Also during that initial orientation the order in which the applicants will be interviewed is determined with consideration being given to class schedules and outside commitments of the applicants. A candidate's time with the interview-conference committee averages approximately 20 to 30 minutes. During this time an attempt is made to evaluate the candidate again in terms of published selection factors as well as to attempt to identify specifically obvious strengths and potential weaknesses. Members of the interview-conference committee are provided at each session with written guidelines and forms for comments. During and or after the time spent with the candidate, each admissions committee members is asked to make written narrative comments on the appropriate place on the forms provided. [Deleted by trial judge]: ~~The comments placed on these forms as well as the candidate's rankings in the opinion of each individual interview-conference committee member are made by the committee independently of each other.~~

(f) After the candidate has been excused, each member present individually and independently places the applicant in one of four categories as a potential candidate for admission to the University of Washington School of Medicine. These categories are as follows:

___ Outstanding. No apparent deficiencies either academically or as prospective health care worker. High probability of making an excellent physician and scholor (Top 10%).

___ Acceptable candidate, with no deficiencies that aren't balanced by other abilities. If admitted, probably would be an average medical student at the University of Washington.

___ Possible candidate, with comparative deficiencies academically and/or with regard to non-cognitive features.

___ Unacceptable candidate. Specific deficiencies. Concern over career choice and/or ability to complete medical training without academic or emotional difficulty.

After the completion of these forms by the individual members of interview-conference committee, and after full committee discussion of each candidate, a summary comment is prepared by the chairperson and a conference disposition (non-competitive, defer for a variety of reasons, reinterview or executive committee review) is agreed upon. The various independent categorizations and narrative comments, as well as the summary, then formally are made a part of each interviewed applicant's file.

(g) Preparation of Skeletal Consideration List. Following each interview-conference, the committee staff calculates an average of the ratings given the candidate by the individual committee members based on a scale of 4 for a rating of OUTSTANDING, downward through 1 for a rating of UNACCEPTABLE candidate. The ratings to be averaged and the average ranking thus obtained are entered on the appropriate portion of the interview-conference summary.

The skeletal consideration list is prepared and updated by committee staff to establish a rough order or agenda for consideration of candidates by the executive committee of the admissions committee for its meetings. Placement on the skeletal consideration list is determined by one's total score grouped in categories 4, 3, 2, and 1, corresponding to the evaluations of the interview-conference committee. Those candidates receiving an average interview conference score of 3.5 or better would be grouped in category 4 in order of their total score which is the sum of the first screen score and the interview-conference score. Category 3 would be composed of those candidates whose interview-conference scores average between 2.5 and 3.5. Category 2 encompasses candidates with interview-conference scores of 1.5 to 2.5, and category 1 lists candidates whose average interview-

conference score was less than 1.5. Plaintiff's position on the skeletal consideration list was at the level or position of number 237. Because many individuals have identical total scores within each category, ties for skeletal consideration list evaluation occur. In reality, when corrected for "ties" the names of more than 237 other candidates, appeared above the plaintiff on the final skeletal consideration list. As a result, of the 546 candidates interviewed, more than 300 have a higher placement than the plaintiff on the skeletal consideration list. The listing for each candidate on the skeletal consideration list included for all candidates components of the total score, name, residence, self-description, date of the interview-conference, identification of the committee involved, individual assessments of reading committee members, individual ratings by interview conference committee members and any final action taken. The skeletal consideration list served as a rough agenda for meetings of the executive committee with regard to selection. For each meeting of the executive committee the skeletal consideration list is revised and updated to reflect the results of the most recent interview-conference committee actions.

(h) Various appendixes to the basic skeletal consideration list include listings of those for whom proxy or substitution interviews have been provided; those applying from the states of Alaska,

Montana, and Idaho; those applying under the combined M.D.-Ph.D program (MSTP); and those in specific two-on-one and one-on-one interview situations--all cross-referenced on the basic skeletal consideration list where appropriate.

(i) Executive Committee (EXCOM). The executive committee of the Committee on Admissions is composed of six members. Five of the executive committee members served as chairpersons of the regular interview-conference committees, including Dr. Belknap. One member of the committee was a medical student. The Assistant Dean for Admissions, Dr. Belknap, is the chairperson of this committee.

The executive committee makes policy decisions with regard to admissions and makes decisions concerning acceptances to the class. Aside from decisions under the early decision program, which must be made by September 1, the executive committee attempts to abide by the uniform acceptance dates of the Association of American Medical Colleges on December 15, January 15, February 15, March 15, and April 15, and thereafter until a class is filled. As previously indicated, the executive committee uses the skeletal consideration list as an agenda for establishing the rough order in which it evaluates individual candidates until such time as the class is filled. When a candidate's name is reached,

the member of the executive committee (or substitute) responsible for that particular interview leads the discussion of that individual's application. After discussion of a candidate, the committee votes a disposition (accept, hold for later comparison, defer for other information, reinterview, or non-competitive). The disposition and its date are recorded on an executive committee review form.

At each meeting of the executive committee conducted either on a monthly or semi-monthly basis, application files of candidates are reviewed by the executive committee. It was the practice of Dr. Benjamin H. Belknap to take to the executive committee meetings a number of application files of the candidates for admission which was approximately two to three times the number of positions to be filled at the particular executive committee meeting. The number of positions to be filled at each meeting was generally determined on the basis of the percentage of candidates that had been interviewed at that time.

The records of the executive committee meetings that were submitted into evidence reflect the date of the meetings, the length of the meetings, the percent of the candidates to be interviewed that had been interviewed as of that date, and the number of acceptances authorized. Generally they reflected the following information:

Date of Meeting	Length of Time (hours)	Percent of Candidates Interviewed	Acceptances Authorized	Approximate Total to Date
9/26/75	2	Early Decision Program	20	
12/8/75	6 1/3	33%	25	45
1/15/76	5 3/4	54%	33	78
2/12/76	4 1/2	70%	15	93
2/24/76	4 1/2	90%	15	108
3/11/76	4 1/2	90%	19	127
3/29/76	4 1/2	94%	15	142
4/15/76	6 1/2	+/- 100%	18	160
4/28/76	5 3/4		17	177
4/30/76	9	100%	8	185
6/8/76	3	100%	1	186
7/16/76	1 3/4	100%	1	187

Approximately 54 percent of the interviews had been completed prior to January 15, 1976. Plaintiff's interview was conducted on January 30, 1976, and by February 12, 1976, approximately 70 percent of the interviews had been completed.

XI.

Of the total number of 1,703 applicants to the University of Washington School of Medicine for the entering class of 1976, 471 were from Washington 28 from Alaska, 93 from Montana, 67 from Idaho, 1,031 from other states, and 13 foreign residents. Of the 1,703 persons that applied for admission to

the School of Medicine at the University of Washington, 1,043 applicants were under consideration for admission. An applicant received consideration for admission if he or she was a resident of the states of Washington, Alaska, Montana, or Idaho. Applicants who were Black Americans, American Indians, Chicanos, or applicants for the "Medical Scientist Training Program" (MSTP) were considered for admission regardless of their state of residence. Of these 1,043 candidates, all those with first screen scores above a level identified as four standard deviations below the mean first screen score of the 1975 entering class for the School of Medicine were seriously considered. These 816 candidates were asked to submit supplemental materials. 546 of the 816 seriously considered candidates were considered potentially competitive by the reading committee for the positions available and were interviewed. 175 applicants were expected to be members of the E-76 class, with 18 holding positions on the alternate list.

In the E-76 class, 120 students were from Washington, 10 were from Alaska, 20 were from Montana, 20 were from Idaho, and 5 were from other states. Of the 175 members of the E-76 class, 4 were Black Americans, 1 was an American Indian, and 1 was a Chicano. There were 1,300 male applicants of which 134 were accepted or approximately 10 percent. There were 413 female applicants of

which 41 were accepted, also approximately 10 percent.

Excluding the 50 positions allocated for Alaska, Montana, and Idaho students, and the two positions awarded to "Medical Scientist Training Program" (MSTP), there were 123 positions. 120 of these positions, or 97.6%, were filled by Washington residents.

XII.

The plaintiff's application file was first evaluated on January 18, 1976, by Dr. Benjamin H. Belknap serving in his capacity as a member of the reading committee of the committee on admissions and Dr. Belknap completed his three-page screening worksheet by marking the section entitled overall analysis that the plaintiff was "competitive." One of the comments made by Dr. Belknap under the general comments section of the screening worksheet about the plaintiff was "no question he has the smarts." The plaintiff's file was next evaluated on January 19, 1976, by Leigh McBride, a medical student. Her independent analysis placed the plaintiff in the "competitive" category. Accordingly, committee staff, under the date of January 20, 1976, invited plaintiff McDonald to an interview-conference scheduled for January 30, 1976, at 1 P.M. Mr. McDonald appeared on January 30, 1976, and met with an interview-conference committee chaired by UDavid Lagunoff, M.D., Professor

of Pathology, James C. Whorton, Ph.D., Assistant Professor of Biomedical History, and James Edstam, a fourth year medical student who has since received his M.D. degree. Committee records indicate that the interview portion of the conference lasted 22 minutes.

Drs. Lagunoff, Whorton, and Edstam each independently rated the plaintiff as a possible candidate with comparative deficiencies academically and/or with regard to non-cognitive features with Dr. Lagunoff rating the plaintiff slightly higher, but still in the same category. Accordingly, committee staff assigned numerical scores to the candidates' ratings and the plaintiff by this means was recorded as having a 2.5 score from Dr. Lagunoff and a score of 2.0 from Drs. Whorton and Edstam. The plaintiff's interview-conference score was determined by averaging the three separate scores and was a 2.17. The interview-conference committee agreed that the appropriate disposition was to forward the application to the executive committee.

XIII.

At its meeting of April 30, 1976, which lasted for some nine hours, the executive committee voted that all candidates not otherwise acted upon be considered noncompetitive for the class entering in the fall of 1976, subject to the chairman's repeat review of applications of all remaining interviewed

candidates. This review was carried out by Dr. Belknap between April 30, 1976 and May 9, 1976. The plaintiff's application was reviewed by the chairman prior to May 10, 1976, and subsequent to that time the chairman reported to the executive committee that his final review had been completed, and that in his judgment, although those considered included many qualified for the study of medicine, there were none the committee would be likely to consider more competitive than those previously admitted to the E-76 class, or placed on its alternative list, based upon the guidelines used by the committee. Mr. McDonald was notified under date of May 10, 1976, that his application for admission to the School of Medicine was denied.

XIV.

Alaska, Montana, and Idaho have no medical schools. Under the WAMI program, each state has contracted with the University of Washington for a certain number of seats in each entering medical school class at the University of Washington. The applicants from each of these states compete in separate applicant pools from seats allotted to their respective states; however, the University of Washington School of Medicine is not required to fill all of the seates contracted for, if there are not enough qualified applicants from a particular state. Funding is received by the University of Washington from Montana, Alaska, and Idaho for those seats in

each entering medical school class which are allotted to Montana, Alaska, and Idaho. The remainder of the funding of the medical school is 30% from the State of Washington and 70% from the Federal government.

XV.

Consistent with overall University of Washington policy, the University's School of Medicine and its faculty have determined that in order to best serve the educational needs of the medical school and to better serve the medical professional needs of this region, it is essential that the School of Medicine should seek greater representation of certain minority groups in its classes where there has been serious under-representation in the School and in the medical profession. The school and its faculty have further determined that the minority groups most seriously under-represented in the school and in the profession in the region are Black Americans, Chicanos, and American Indians. To alleviate this imbalance in the medical school and the medical profession in this region, it is necessary to recruit qualified applicants of qualified minority applicants from within Washington and the WAMI region is insufficient to achieve any marked redress of this under-representation. The medical school and its faculty have also determined that some members of minority groups may have suffered cultural and educational disadvantages by virtue of

their ethnic background, and have determined that such disadvantages are properly to be considered when evaluating the overall qualifications of such an applicant. Recent estimates place the number of minority physicians in the State of Washington at 3 Chicanos, no American Indians, and 16 Black physicians. There are approximately 80,000 Black Americans residing in the State of Washington, approximately 80,000 Chicanos in the State of Washington, and a substantial population of American Indians.

XVI.

The University's School of evaluates its individual applicants for admission without regard to their sex. Ten percent of the males who applied and 10 percent of the females who applied were accepted.

XVII.

The School of Medicine gave no separate consideration nor separate treatment to Black American, Chicano, and American Indian applicants that were interviewed. The fact that the applicant was a member of a minority race was considered by the medical school.

XVIII.

Plaintiff, like many other applicants who were unable to gain admission to the University of Washington School of Medicine, was not unqualified for medical school attendance. Plaintiff was in that

group of qualified candidates whose overall credentials were of average quality in comparision with those of the many candidates with whom he was in competition for the limited number of positions available. Under the sophisticated selection system used by the medican school he would not have been admitted even if all six of the minority applicants were removed. [Deleted by trial judge]: ~~Mr. McDonald's position on the skeletal consideration list was sufficiently far down that he still would not have been admitted.~~ Plaintiff McDonald was not on the designated alternate list for admission to the medical school.

XIX.

The University of Washington School of Medicine admissions process is a sophisticated system for interview processing and finally selecting candidates to their medical school. The Assistant Dean, Dr. Belknap, spent virtually all his activity working in this area, attending national conferences and meeting with other knowledgeable people in the field of medical school admissions. The admissions process used for the E-76 class was the product of an evolution of admissions practices over a number of years. A major revision of the admissions process was initiated and coordinated by Dr. Benjamin H. Belknap in the fall of 1974. As a result of that revision in November of 1974, proposed guidelines for the interview-conference committee were

established which contained six areas of direction: (1) selection factors; (2) means for E-75 entering class; (3) some suggested guidelines for evaluation of (a) motivation; (b) maturity; (c) humanitarian qualities; (d) candidate's strengths and weaknesses; (4) MCAT suggested areas of non-cognitive assessment; (5) suggested areas for discussion with applicants, and (6) some suggested areas for observation during interview. The language for those guidelines was derived in part from information from the Association of American Medical Colleges, from national conferences attended by Dr. Belknap, from information from psychiatrists from the Department of Psychiatry of the School of Medicine, national publications and studies reviewed by Dr. Belknap, as well as former members of the school of Medicine's admissions committee and the School's assistant attorney general.

In addition to the formulation of the guidelines used for the E-76 class, the screening worksheet was also formulated in the fall of 1974, and the basic forms for rating of the candidates by the members of the interview-conference committee as well as the interview-conference summary sheet were also developed in November of 1974, and revised in November, 1975.

XX.

Each member of the reading committee when reviewing the application files of candidates using

the screening worksheet spent approximately 20 to 30 minutes per application conducting that independent review. Each member of the interview conference committee spends approximately 30 minutes reviewing their own personal Xerox copy of the candidate's application file the day before the interview-conference making notes on that copy of various areas for inquiry during the interview-conference. Prior to the interview portion of the conference, the members of the interview-conference committee briefly discussed the information contained in the candidate's application file, and indicate areas of concern and possible directions for inquiry during the interview portion of the conference. As a general practice at the conclusion of the interview, the members of the conference committee excused the candidate from the conference and independently complete their individual rating forms of the candidate. Discussion is then directed by the chairman and the chairman of the interview-conference committee during discussion with the other committee members, completes the interview conference committee summary sheet setting forth generally the conclusions of the interview conference committee.

XXI.

The members of the admissions committee prior to their participating in the interview conference committee attend a training session conducted by

Dr. Belknap during which time they are provided with copies of the Association of American Medical Colleges Medical School Requirements book, the School of Medicine bulletin, the sample screening worksheet, a copy of the guidelines which are returned at the end of the meeting, a completed application to review at that particular meeting, and during that meeting they are given direction in the methods of evaluating the application files of candidates for admission to the medical school. If an individual was unable to attend the entire meeting, there would be an individual meeting scheduled with Dr. Belknap which would last for over an hour, during which time the same material discussed in the general meeting would be discussed by Dr. Belknap and the committee member. The physician and student members of the admissions committee have all received ~~extensive~~ training, both in terms of lectures and practical experience in interviewing during the course of their studies in medical school. The Ph.D. members of the admissions committee are all full-time faculty members of the School of Medicine and have extensive and frequent contact with medical students through their teaching in the School of Medicine. Prior to participating in an interview conference, each member of the admissions committee participates in the reading committee and gains experience in evaluating of application files through the use of the screening work-

sheet in evaluating applicants' records as a part of the reading process. [Deleted by trial judge]: ~~Members of the admissions committee prior to their full participation in an interview conference attend an entire interview conference session for one full afternoon and observe and participate in four to five actual interviews of medical school applicants though not making out evaluations of those applicants prior to their participation in an interview conference committee as an acting member of that interview conference committee.~~

At the commencement of the interview-conference committee meeting, each member of the interview-conference committee is provided with a red folder which contains attached to each of the interior sides of that red folder, a copy of the proposed guidelines for the interview conference committee for E-76 and references made to those guidelines during the course of interview conference committee meetings. The members of the interview-conference committee rate the candidates comparatively on the basis of the selection factors of the University of Washington School of Medicine, on the information that they have been provided by the candidate through his or her application file and through the discussion which takes place during the interview portion of the interview-conference committee meeting.

XXII.

No substantial evidence of monetary damages was presented by plaintiff, and plaintiff's claim for monetary damages is based on speculation and conjecture.

From the foregoing FINDINGS OF FACT, the court now makes the following:

CONCLUSIONS OF LAW

I.

Under RCW 28B.10.050 and 28B.20.130(3) the power and duty to establish and determine entrance requirements for admission of students to the University of Washington School of Medicine is vested in the Board of Regents of the University of Washington. The delegation of a part of these powers and duties to the dean and faculty of the School of Medicine of the University of Washington is authorized by RCW 28B.10.528.

II.

The promulgation and application of the admissions policies of the University of Washington School of Medicine constitute discretionary action by a duly authorized administrative body of the State of Washington.

III.

The 1976 admissions decision regarding plaintiff's admission to the University of Washington School of Medicine was not arbitrary or capricious or violative of plaintiff's constitutional rights.

IV.

The admissions policies and procedures of the University of Washington School of Medicine do not discriminate against applicants because of their sex. As applied to the plaintiff, the admissions policies and procedures did not discriminate against the plaintiff on account of his sex.

V.

The admissions policies and procedures of the University of Washington School of Medicine do not discriminate against applicants because of their race. As applied to the plaintiff, the admissions policies and procedures did not discriminate against plaintiff on account of his race.

VI.

The admissions policies and procedures of the University of Washington School of Medicine do not invidiously discriminate against applicants on the basis of their residence. As applied to the plaintive, the admissions policies and procedures did not invidiously discriminate against the plaintiff on account of his residence.

VII.

The admission policies and procedures of the University of Washington School of Medicine do not discriminate against applicants because of their sociological, economic, or political beliefs. As applied to the plaintiff, the admissions policies and procedures did not discriminate against the plaintiff

on account of his sociological, economic, or political beliefs.

VIII.

The admissions policies and procedures of the University of Washington School of Medicine were developed and promulgated in accord with the discretion allowed to the defendants herein, said policies and procedures were fair and reasonable, and are not arbitrary or capricious. As applied to the plaintiff, the admissions policies and procedures used in evaluating the plaintiff's application to the 1976 entering class of the University of Washington School of Medicine were fair and reasonable and did not constitute arbitrary or capricious conduct on the part of any defendents herein.

IX.

The plaintiff is not entitled to an order directing defendents to admit and enroll plaintiff in the University of Washington School of Medicine.

X.

The plaintiff is not entitled to receive any monetary damages from any of the defendents herein.

XI.

The defendants are entitled to a judgment of dismissal with prejudice of the complaint of the plaintiff, and defendents are entitled to recover their costs and disbursements herein to be taxed.

DONE IN OPEN COURT THIS 2nd day of June, 1977.

James J. Dore, Judge

APPENDIX D

MANDATE OF WASHINGTON SUPREME COURT

SUPREME COURT NO. 45864
KING COUNTY NO. 817562
COURT OF APPEALS NO. 5788-I

The State of Washington to: The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on August 2, 1979, became the decision terminating review of this court in the above entitled case on October 31, 1979. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:

$55.00 in favor of respondents and against appellant.

An order Denying Motion for Reconsideration was filed on October 31, 1979; copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 6th day of November, A.D. 1979.

JOHN J. CHAMPAGNE
Clerk of the Supreme Court
State of Washington

APPENDIX E

WASHINGTON SUPREME COURT ORDER

DENYING PETITION FOR REHEARING

NO. 45864

ORDER DENYING MOTION

FOR RECONSIDERATION

McDONALD v. HOGNESS

The Court having unanimously decided that the appellant's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 31st day of October, 1979.

ROBERT UTTER

Chief Justice

92 Wn.2d 431

APPENDIX F

ORAL DECISION OF

WASHINGTON SUPERIOR COURT FOR

KING COUNTY

Judge James J. Dore, May 17, 1977:

THE COURT: I just want to thank all the counsel who participated in this case, and especially Mr. Sanders, who represented Mr. McDonald, and Mr. Martin and Mr. Milam, as well as the legal assistant, Kent Nakamura, who has cooperated in the preparation of this case.

I would like to mention that at this juncture of the case, the plaintiff has rested, and the Court has the opportunity to weigh the evidence and see if there is really any question of fact and whether the Court can make a determination as a mater of law as to the propositions that are presented to the Court. And I think I have reached that position, and I am prepared to make a determination.

First, if you were here earlier in the morning, you were aware of many situations where I was admonishing younger people to go to school and try to get an education and study hard, so to speak.

I am very sympathetic here with Fred McDonald. He has labored hard and is an outstanding student, and he certainly should have every

consideration there is to give, and I think that goes to all applicants for the medical and law school. There are so many worthy candidates out there and there ar so few positions open; however, my responsibility is to make a determination as based upon the law and within the purview of my responsibilities.

Now, after we discussed this case for a considerable length of time and taking much testimony, we really come down to two basic propositions: We have an admissions case here and whether there is a reverse discrimination under the State and Federal Constitutions is the first issue we have to inquire into.

The University of Washington Medical School has rather a sophisticated system for interview processing and finally electing candidates to their medical school. It is indicative that the Assistant Dean, Dr. Belknap, virtually spends all his activity working in this area, attending national conferences and meeting with other people.

There was further testimony that--I think Dr. Cullen has testified they spend from five to seven thousand hours annually to go through these applications, which is far in excess of the amount of man hours that goes into teaching the first year class. And so I think that we can say that they make a real effort to select out the people they want for medical school.

Now, I don't think we have to talk about the students that are excluded until we come down to approximately the last 500 who are personally interviewed, and we find that all these students are qualified. I am sure the medical school could pick the last 100 or the first 100 and have substantially the same results. It probably wouldn't make any difference. I think the barometer is the high caliber of the students who are competing to be in medical school.

However, their responsibility goes further than that. They have the responsibility from these 500 to select out the best students for the medical school, for the community, qualifying under the policy promulgated by the dean and the admissions officers of the school.

And so they have set up the interview. And they have various categories--they talk about the academic record and the medical college aptitude scores, and they have these other categories which they feel are important in developing a physician who will have an impact on the community. This is not an easy thing to do.

I think when you come to court, you can't leave your common sense behind. If you are hiring people and you have 10 finalists, you certainly want to have the opportunity to look at these people and talk to them and make some first-hand judgments as to whether or not you want

them to be part of your organization. Regardless of their skills, you have certain built-in barometers and scales to measure these people, even if it is just simple common sense.

But, here, we have more than that. We have the interviewers, and the interviewers were trained. Some of them are trained to the extent of one hour, plus their own personal experience--some of them had prior experience and some of them had experience in medical school, together with their own background and general ability. That certainly qualifies them to make a judgment in this matter.

Now, they were furnished with these guidelines, recognizing their rather esoteric concepts, but I think we are measuring very fine things. Motivation is certainly a very difficult thing to define and it is difficult to define demonstrated humanitarian characteristics.

To prepare some standards for these would be extremely difficult, but the school has made efforts to do just that. They have been in conference with the psychologists from the School of Psychology, trying to refine this process as much as they can.

When we look at the results, the results show that only 1.3 percent of the students fail to complete the program. That's almost 100 percent. I don't think you can have a better success rate than that.

I think we had further testimony from Dr. Cullen, who said if they didn't have the interview face to face, they would probably be 92 percent effective.

These are very interesting facts, but we have to go back to the interview and the standard of law we are talking about. We are here in an equitable proceeding. It is an extraordinary remedy. You are asking the Court to tell the University of Washington how to conduct their interview, how to conduct a discretionary act.

We don't do that. If they refuse to act, the Court will direct them to act, but we are just not equipped to second-guess their discretionary activity.

Now, in their determination, if they are arbitrary or capricious in a meaningful act, if they have some program of selecting one student over another--if the Court discovers some type of a scheme in which an unfair result is reached, the Court can interfere and can direct a different activity.

Here, under the testimony of Dr. Sax, he indicated that this program is not--the interview is not a good program. It should be in more detail.

Well, to make this decision, I concede that, but still, it doesn't make any difference. This is a decision the University of Washington has to make. They can formulate their own plan as to the interview.

Now, as to the discrimination, we have a group of people who are all qualified. The minorities are all qualified and, in fact, it is interesting. We heard the testimony of one of the doctors who testified that he worked with the minorities who were unqualified and he had such a difficult time, he then took a position that they would only deal with qualified minorities.

And they went throughout the United States to recruit these people, and they have been very successful. Our Supreme Court tells us, in the interview, they can take into consideration the fact that they are a minority and they are white, as long as they are racially neutral.

We had a lot of testimony, and it is a hard thing to talk about, but I think blackness is merely a characteristic of a human being. It is one of the things that goes into them, and it isn't any different than whiteness or any other quality, like the ability to do one thing or the other. This can be considered.

And the interviewers were very honest. They said they did consider this and this was part of their determination, and this is certainly within the Constitution.

I think further I can go ahead and made a finding that the selection program as outlined by the University of Washington Medical School is not

a discriminatory program, and their interview process certainly is not arbitrary and capricious and certainly is within the constitutional bounds.

So at this time, the Court is in a position where I have to deny this relief. And I am sorry Mr. McDonald is not able to go to medical school, but that's what the law indicates.

Thank you, gentlemen. V.R. 514-520

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution in pertinent part provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 601, Title 6 of the 1964 Civil Rights Act (42 U.S.C. 2000d) states:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1168

FREDERICK N. MCDONALD,
Petitioner

v

WILLIAM P. GERBERDING, President of the University of Washington; DR. BENJAMIN H. BELKNAP, Chairman of the Admissions Committee of the University of Washington School of Medicine; DR. ROBERT L. VAN CITTERS, Dean of the School of Medicine; GORDON C. CULP, J. HANS LEHMANN, ROBERT D. LARABEE, R. MORT FRAYN, MRS. WILLIAM H. GATES, TAUL WATANABE, R. F. PHILIP, the Board of Regents of the University of Washington; W. W. WASHBURN, Registrar of the University of Washington; UNIVERSITY OF WASHINGTON, Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE
Supreme Court of the United States

October Term, 1979

No. 79-1168

FREDERICK N. MCDONALD
Petitioner,

v.

WILLIAM P. GERBERDING, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The unanimous opinion of the Washington State Supreme Court in this matter is reported as *McDonald v. Hogness*, 92 Wn. 2d 431, 598 P.2d 707 (1979). It is reprinted in Appendix A to the Petition for a Writ of Certiorari filed herein.

QUESTIONS PRESENTED

1. Does the denial of an application for admission to a state medical school violate the equal protection clause of the fourteenth amendment or Title VI of the Civil Rights Act of 1964 because race is considered in the admissions process, where

(a) the application was denied without regard to race, and

(b) the application would have been denied even if race was nowhere considered in the admissions process?

2. Is the denial of an application for admission to a state medical school a deprivation of liberty or property within the meaning of the fourteenth amendment?

3. Does the consideration of race as one factor in the overall evaluation of applicants in an admissions program in which all applicants compete against each other violate the fourteenth amendment's equal protection clause, where race is considered in order to obtain a diverse and integrated student body, and meet medical manpower needs of the region served by the school?

STATEMENT OF THE CASE

An accurate and comprehensive statement of the facts of this case is set forth in the Findings of Fact and Conclusions of Law adopted by the trial court, a copy of which is attached as Appendix C to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington (hereinafter, Petition). Petitioner challenged only Finding of Fact XXII in his unsuccessful appeal to the Washington State Supreme Court. Respondent invites the Court to consult those findings as they are not otherwise in dispute.

Petitioner initiated this litigation in the Superior Court of the State of Washington for King County in order to challenge

the denial of his application for admission to the University of Washington School of Medicine. The court dismissed the action after petitioner presented his case, and was affirmed in a unanimous opinion of the Washington State Supreme Court.

The respondent Board of Regents of the University of Washington operates and maintains the School of Medicine as authorized by the state legislature. Pursuant to Revised Code of Washington (RCW) 28B.20.130(3) the Board of Regents has the general power and duty to "establish entrance requirements for students seeking admission to the University." For Medical School admissions, this responsibility has been delegated to the School of Medicine which established the admissions requirements for the 1976 entering class, the class to which petitioner sought admission.

The admissions process was described by the trial court as "a sophisticated system for interview processing and finally selecting candidates for [the University of Washington's] medical school." Petition, App. F at 5. Generally, there were three levels of applicant review: (1) evaluation of paper credentials alone by the Reading Committee; (2) evaluation of paper credentials and the applicant personally by an Interview-Conference Committee; and (3) review of application files by the Executive Committee of the Committee on Admissions.

The selection factors for admission to the University of Washington School of Medicine in 1976 were set forth in *Medical School Admissions Requirements 1967-77* as follows:

> Candidates are considered comparatively on the basis of academic performance, medical aptitude, motivation, maturity, and demonstrated humanitarian qualities. Extenuating background circumstances are considered as they relate to these selection factors.

Finding of Fact X, Petition, App. C at 11. Academic performance is generally measured in part by Grade Point Average (GPA) and medical aptitude is generally measured in part by the Medical College Aptitude Test (MCAT) score. Motivation maturity, humanitarian qualities, and extenuating background circumstances are evaluated in part through the use of interviews.

In the admission process an applicant's GPA and MCAT scores are converted, weighed, and combined by a calculation formula to arrive at a single score called the First Screen Score. The First Screen Score is later combined with the Interview-Conference Score and the result is called the Total Score. A Skeletal Consideration List is prepared to established a rough order of consideration of candidates by the Executive Committee. That list places applicants in four groups based upon Interview-Conference Scores, and ranks applicants within groups by Total Score.

The Interview-Conference Committee is generally composed of three members of the Committee on Admissions. Each interview-conference averages approximately 20-30 minutes and the committee members present at each such interview-conference have had prior access to and have studied advance copies of the candidate's application files. Findings of Fact X(d) and XX, Petition, App. C at 13-15 and 29. The members of the Interview-Conference Committees were trained and given guidance and direction for the evaluation they were to make in the admissions process. Finding of Fact XXI, Petition, App. C at 29-31. The guidelines were derived from a national task force on admissions, and other national and regional studies. Finding of Fact XIX, Petition, App. C at 27-28.

The admissions program did not treat applicants differently on the basis of race. Finding of Fact XVII, Petition, App. C at 26. The Chairman of the Committee on Admissions and Assistant Dean of the Medical School, Dr. Benjamin H. Belknap, testified that a diverse student body was important to the educational program offered by the School of Medicine. As a result, race was "considered to the extent that every individual's uniqueness is considered." Verbatim Record of Proceedings at 487 (hereinafter V.R.).

There were 175 positions available for the 1976 entering class, of which 50 were allocated to applicants from Montana, Alaska, and Idaho pursuant to agreements with these states and with the approval of the Washington State Legislature. *See* RCW 28B.15.225 and Chapter 28B.70 RCW. One thousand seven hundred and three individuals applied for admission. Finding of Fact VII, Petition, App. C at 6. Five hundred and forty six of those considered potentially competitive by the Reading Committee were considered for review by the Interview-Conference Committees.

Petitioner's application was denied on the basis of the published selection criteria. While the trial court acknowledged that he was an "oustanding student" (Petition. App. F at 1), it placed him "in that group of qualified candidates whose overall credentials were of *average quality* in comparison with those of the many candidates with whom he was in competition for the limited number of positions available." Finding of Fact XVIII, Petition, App. C at 26-27 (emphasis supplied).

Petitioner ranked 204th in the applicant pool on the basis of his First Screen Score (combined GPA and MCAT), and he was among the 546 applicants who were granted interviews.

After the interview-conference, over 300 applicants placed higher than petitioner on the Skeletal Consideration List. Finding of Fact X (g), Petition, App. C at 16-17. The Executive Committee denied petitioner's application, and did not place him on the 18-person alternate list. Even if no minority applicants had been admitted to the School of Medicine in 1976, an unchallenged finding of the trial court shows that petitioner still would not have been admitted. Finding of Fact XVIII, Petition, App. C at 26-27.

ARGUMENT

I.

ON THE FACTS OF THIS CASE, PRELIMINARY ISSUES ARE DISPOSITIVE AND THUS THE CASE DOES NOT PRESENT SIGNIFICANT ISSUES UNDER THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

A. *Consideration of race in the Medical School's admissions program was not a "but for" cause of the denial of petitioner's application, and hence the lawfulness or unlawfulness of consideration of race in the program would not be dispositive of petitioner's claim.*

Petitioner's equal protection challenge to the denial of his application for admission to the University of Washington Medical School is premised on the consideration of race in the Medical School's admission process. Petitioner is not entitled to judicial relief, however, if the consideration of race

was not the cause of his "injury."[1] The causation requirement was explained in a case in which plaintiffs challenged a zoning decision by the Village of Arlington Heights on equal protection grounds. The Court there reasoned as follows:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not ncessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-71 n.21 (1977). Because petitioner would not have been admitted to the Medical School even if no racial minorities had been admitted, he cannot "fairly . . . attribute the injury complained of to improper consideration of a discriminatory purpose" to favor members of minority groups. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J.) (application of "but for" test to medical school admissions case).

Specifically, the trial court in this case found:

> Under the sophisticated selection system used by the medical school [petitioner] would not have been admitted even if all six of the minority applicants [who were admitted] were removed.

---

1. The causation requirement is clear insofar as petitioner relies on Title VI of the 1964 Civil Rights Act, 42 U.S.C § 2000d (1976). To make out a claim under that statute, petitioner must establish that his application was denied "on the ground of race." *Id.* If it was denied for other reasons not prohibited by the statute, as was the case here, there is no violation of the statute.

Finding of Fact XVIII, Petition, App. C at 26-27. This finding has never been challenged by petitioner. Thus, even if there had been no consideration of race in the admissions process, and even if, as a result, no minority applicants gained admission, petitioner's application still would have been denied.[2] The Washington State Supreme Court thus held:

> At the outset, we note that the evidence shows McDonald would not have been admitted into the [1976] class even absent the six minority persons accepted and without any consideration of race. This alone is justfication for denying relief on equal protection grounds.

McDonald v. Hogness, 92 Wn. 2d 431, 436, 598 P.2d 707, 711 (1979); Petition, App. A. Since this finding is dispositive, the underlying validity of the consideration of race in the admissions program would not be an issue before the Court.[3]

B. *Petitioner has neither a property nor a liberty interest in a medical education at the University of Washington, and hence the due process clause of the fourteenth amendment is inapplicable to the denial of his application for admission.*

---

2. Petitioner argues that "If favored racial minorities are to receive "plus points" on the interview, so to [sic] should Fred McDonald." Petition at 12. If petitioner had received "plus points," so too would all other nonminority applicants. Petitioner's position in the applicant pool thus would have remained unchanged in relation to nonminority applicants, and his appilcation still would have been denied.

3. The Washington State Supreme Court went on to consider the validity of the use of race in the admissions program "because of the public importance of the issue and the likelihood of its recurrence." 92 Wn. 2d at 436, 598 P.2d at 711. Without more, these factors have never been invoked by the United States Supreme Court to justify issuing an essentially advisory opinion. "The 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'" *DeFunis v. Odegaard*, 416 U.S. 312, 316 (state supreme court decision vacated and remanded as moot), *decision reinstated on remand*, 84 Wn. 2d 617, 529 P.2d 438 (1974) (public importance doctrine).

Petitioner argues that the denial of his application was a denial of procedural due process in violation of the fourteenth amendment. Petition at 10-11, 13. The Court has made clear, however, that the guarantee of procedural due process applies in cases such as this, according to its terms, only to a deprivation of life, liberty, or property. In a medical school dismissal case, the Court stated:

> To be entitled to the procedural protections of the Fourteenth Amendment, respondent must in a case such as this demonstrate that her dismissal from the School deprived her of either a "liberty" or a "property" interest.

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 82 (1978). Here, petitioner has never alleged a property or liberty interest in being admitted to the University of Washington School of Medicine. No state statute, contract, or informal agreement gives petitioner an entitlement to be enrolled in the Medical School, and it hardly can be claimed that the denial of his application infringed a liberty interest protected by the fourteenth amendment. *Cf. Paul v. Davis*, 424 U.S. 693 (1976) (reputation not a protected liberty interest).

II.

THE DECISION OF THE WASHINGTON STATE SUPREME COURT IS CONSISTENT WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *BAKKE*

Petitioner argues that there is a conflict between the decision of the Washington State Supreme Court in this case and the decision of the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Even if the lawfulness of the consideration of race in the admissions program

was an issue presented here, the unanimous decision by the Washington State Supreme Court was consistent with *Bakke*, and therefore this is not a case in which the Court's supervisory powers need to be exercised to correct an erroneous decision.

There were three principal opinions in *Bakke*. We consider first the opinions of Mr. Justice Powell (announcing the Judgment of the Court) and Mr. Justice Brennan (joined by Justices White, Marshall, and Blackmun). Both opinions held that under certain conditions race may be considered in a state medical school's admissions program, and both opinions endorsed an admissions program such as the one used by Harvard College. The admissions program at the University of Washington School of Medicine is within the constitutional parameters established by the two opinions.

Mr. Justice Powell enunciated the stricter test. He stated that in order to justify the consideration of race in this context, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." 438 U.S. at 305 (Powell, J.). One purpose or interest Mr. Justice Powell found to be "permissible and substantial" was the attainment of a diverse student body. Although concluding that "the assignment of a fixed number of places to a minority group is not a necessary means toward that end," he approved a program wherein "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." The "principal evil" of the program involved in *Bakke*, according to Justice Powell, was the denial of "individualized consideration without regard to . . . race."

The admissions program at the University of Washington School of Medicine avoids the principal evil identified by Justice Powell. Although race is considered in the program, there is "no special consideration nor separate treatment [of] Black American, Chicano, and American Indian applicants that were interviewed." Finding of Fact XVII, Petition, App. C at 26 (not challenged by petitioner). Thus the very aspect of the admissions program petitioner asserts to be constitutionally defective, the interview process, is characterized by individualized consideration of applicants without regard to race.

Moreover, one of the goals behind the consideration of race at the University of Washington is to obtain a diverse student body—a goal Justice Powell described as "compelling in the context of a university's admissions program." 438 U.S. at 313 (Powell, J.). Petitioner's claim that the diversity sought by the University of Washington is "racial diversity" and "not what this Court meant" by diversity, Petition at 12, was correctly rejected by the Washington State Supreme Court. "The record . . . refutes the contention Belknap was not referring to diversity in Powell's broad sense, which involves consideration of race in conjunction with other attributes." 92 Wn. 2d at 440-41 n.8, 598 P.2d at 713 n.8; Petition, App. A. In the words of the Chairman of the Admissions Committee, Dr. Belknap, "race is considered to the extent that every individual's uniqueness is considered." V.R. at 487. Thus both as to the goal it pursued and the means by which it did so, the University of Washington acted in a constitutionally permissible manner.

Analysis of Mr. Justice Brennan's opinion leads to the same conclusion. Justice Brennan stated the controlling test as follows:

> Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.

438 U.S. at 361 (Brennan, J.) In seeking to obtain diversity, meet medical manpower needs in the region, and promote racial integration in public education, the University of Washington had an important purpose for the consideration of race in the program. Because the program does not stigmatize any discrete group or individual, and uses race in a reasonable manner in light of the program's objectives, it is within the constitutional parameters articulated by Mr. Justice Brennan.

Mr. Justice Stevens (joined by Chief Justice Burger and Justices Stewart and Rehnquist) did not reach the constitutional issue in *Bakke*. He voted to affirm the judgment of the California Supreme Court, ordering Bakke's admission to medical school, on the basis of section 601 of the Civil Rights Act of 1964. Specifically, he concluded that "[t]he University's special admission program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the medical school because of his race." 438 U.S. at 421 (Stevens, J.). Because it was established in this case that petitioner's application was not denied because of his race, there is no conflict between the decision of the Washington State Supreme Court and Mr. Justice Stevens' opinion in *Bakke*.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1168

Frederick N. McDonald

Petitioner

v.

WILLIAM P. GERBERDING, President of the University of Washington; DR. BENJAMIN H. BELKNAP, Chairman of the Admissions Committee of the University of Washington School of Medicine; GORDON C. CULP, J. HANS LEHMANN, ROBERT D. LARABEE, R. MORT FRAYN, MRS. WILLIAM H. GATES, TAUL WATANABE, R. F. PHILIP, the Board of Regents of the University of Washington; University of Washington, Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1168

FREDERICK N. McDONALD, Petitioner,

v.

WILLIAM P. GERBERDING, President of the University of Washington; et al, Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' statement of the case departs from the record in several important respects.

On page 5 respondents assert:

> "The admissions program did not treat applicants differently on the basis of race. Finding of Fact XVII, Petition, App. C at 26."

The finding reads, however:

> "Finding of Fact XVII. The School of Medicine gave no separate consideration nor separate treatment to Black American, Cicano, and American Indian applicants that were interviewed. The fact that the applicant was a member of a minority race was considered

by the Medical School." (Emphasis supplied.)

Although these favored minority applicants were not considered "separately," they were certainly considered "differently" by virture of their minority racial status.

The same paragraph of respondents' brief quotes Dr. Belknap's testimony that race was "considered to the extent that every individual's uniqueness is considered. V.R. 487." The implications of this rather benign statement, however, should not be overlooked. Respondents take the position that the color of an applicant's skin, per se, may be weighed as heavily in favor or against the applicant's ultimate admission as any non-racial factor such as medical aptitude, academic excellence, or extracurricular activities. This petition, however, raises the fundamental question of whether the respondents are entitled to treat a racial "uniqueness" to the same extent as any other "uniqueness." It is submitted that this is exactly what the Constitution forbids:

> "But racial discrimation is not just another competing consideration." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977).

Respondents' reference (page 5) to McDonald's 204th place ranking on the basis of his First Screen Score is also misleading. The First Screen Score

was computed for all applicants to the UW Medical School regardless of residence; however, nonresidents (other than favored minority students) were not seriously considered in the admissions process or even interviewed. Finding XI, Petition, App. C at 21. Excluding the nonresidents, petitioner's First Screen Score placed him well within that group of applicants who would have been offerred an acceptance if the First Screen Score were the only criteria. As a matter of fact, McDonald's First Screen Score was better than approximately half of the Washington residents who were actually admitted and was superior to all of the favored racial minorities actually admitted.

Reference to McDonald's relative placement on the Skeletal Consideration List (page 6) is similarly misleading. As noted in some detail in the original petition, the primary factor determining placement on this list is the applicant's inverview score. It is the interview which is employed as the racially discriminatory device and it is the interview which lacks governing principle in its application. Respondents seek to benefit from the very inadequacies which are called into question.

ARGUMENT

A. Fred McDonald, "but for" his particular race, would have been admitted to the UW Medical School.

The trial court specifically found (Finding XVII, Petition, App. C at 26) that "the fact that the applicant was a member of a minority race was considered by the medical school." It did not purport to make a finding that had Fred McDonald been a member of the favored minority race, his application would have been, in any event, denied. The record supports the opposite conclusion. If the words "but for" are meaningful in the Equal Protection context, they should be used with reference to the determining factor of the challenged classification - race, in this case. "What if" Fred McDonald was, for example, Black? McDonald's application should have been treated just as favorably.

> "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Bakke v. University of California Regents, 438 U.S. 265, 290 (1978).

Village of Arlington Heights, supra, is distinguishable from the case at bar. That action involved a Equal Protection challenge to a zoning ordinance limiting development to single family residences. The plaintiffs contended that the ordinance was racially discriminatory in effect since racial minorities were more likely to participate in the

use of high density dwellings. Racial considerations, unlike the case at bar, were not apparent from the face of the zoning ordinance and the relevant inquiry was relegated to a question of "motivation."

The case at bar, however, does not deal with the question of motivation, but with the fact of racial discrimination and its possible justification. In other words, we are not here concerned with establishing the "purpose:" we are dealing with whether or not the purpose is "impermissible." Arlington would appear to stand for the proposition exactly opposite respondents' contention: once an "impermissible purpose" has been established, the complainant is entitled to his remedy.

Respondents also urge (n. 1, p. 7, Resp. Brief) that relief is unavailable to the petitioner pursuant to 42 U.S.C. 2000d (1976) which requies that the petitioner establish his application was denied "on the ground of race." Respondents, however, have the burden to show petitioner's application would have also been denied had be been of a different race. The burden has not been met.

B. An arbitrary or capricious denial of the petitioner's application violates his property and/or liberty interests secured by the Due Process Clause of the 14th Amendment.

Respondents in effect urge that petitioners' Due Process rights are not violated even if he sucessfully establishes that his application was arbitrarily denied. Reliance is misplaced upon Board of Curators of the University of Missouri v. Horowitz 435 U.S. 78 (1978). The holding of the case, however, is otherwise. Horowitz concerned an already enrolled student who was dismissed for failure to meet academic standards. She questioned the dismissal procedure on Due Process grounds. This court ultimately held that if she was entitled to Due Process, she received it under the facts of the case. The Court specifically reserved:

> "We need not decide, however, whether respondents dismissal deprived her of a liberty interest in pursuing a medical career..." at 84.

> "Assuming the existence of a liberty or property interest, respondent has been awarded at least as much Due Process as the 14th amendment requires..." at 85.

Justice Marshall's concurring opinion sought to clarify that Horowitz was entitled to at least the procedural Due Process afforded. Marshall quoted approvingly from Judge Friendly:

> "As Judge Friendly has written in a related context, when the state seeks 'to deprive a person of a way of life to which (s)he has devoted years of preparation and on which (s)he has come to rely,' it should be required first to provide a 'high level of procedural protection.'" at 100.

The importance and impact of the denial of Fred McDonald's application cannot be overstated. Respondent has never previously questioned the applicability of the Due Process Clause to consideration of McDonald's application and the Washington State Supreme Court opinion is written based upon the understanding that the Due Process Clause is, in fact, applicable. Petition, App. A p. 443 et seq.

C. The Washington State Court Supreme decision is inconsistent with the decision of United States Supreme Court in Bakke.

Respondent contends that the U.W. program is consistent with the Bakke opinion written by Justice Powell. (p. 11):

> "Although race is considered in the program, there is 'no special consideration or separate treatment [of] Black American, Chicano, and American Indian applicants that were interviewed.' Finding XVII, Petition, App. C at 26 ..." (Emphasis added).

Respondent, however, misquotes Finding XVII which says the school of medicine gave no "separate" consideration rather than "special" consideration. The vice identified in justice Powell's opinion was not a matter of form but of substance - preferring one application over another because of race.

The last sentence in the same paragraph of respondents' brief is also inaccurate:

> "Thus the very aspect of the admissions program petitioner asserts to be constitutionally defective, the interview process, is characterized by individualized consideration of applicants without regard to race." Respondent brief 11.

The trial court found, however, just the contrary:

> "The fact that the applicant was a member of the minority race was considered by the medical school."

Petition, App. C at 26, Finding XVII

Respondent purports to justify the discriminatory admission process because it fosters "diversity" in the sense used by Justice Powell. The agreement found in the state supreme court opinion serves to frame the issue rather than resolve it. As to what is meant by "diversity" the Court's intention is directed to the testimony of Dr. Belknap quoted on page 5 of the petition.

Respectfully submitted,

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